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No. _____

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In The Supreme Court of the United States

LINDA LEBOON,

Petitioner,

v.

LANCASTER JEWISH COMMUNITY CENTER ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CETIORARI

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QUESTIONS PRESENTED

1. Where an organization is not controlled by a church, synagogue, board of elders or rabbis (none of whom are on its independent board), is not funded by a church, synagogue or religious organization, was granted a tax-exemption as an educational (not a religious) organization, did not require staff to adhere to any code of beliefs or behavior based on its religion, all of whose federal and state filings indicate its purposes are other than religious, and agreed to a United Way policy banning religious discrimination, is it entitled to a religious exemption in a matter in which an employee with an excellent work record was fired for attending Messianic worship at her Protestant church?

2. Should the court grant certiorari because the lower court's decision conflicts with cases in the Third, *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991), Fourth, *Shaliehsabou v. Hebrew Home of Washington*, 363 F.3d 299 (4th Cir. 2004), Ninth, *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 461 (9th Cir. 1993), *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988) & Eleventh Circuits, *Samford v. Killinger*, 113 F.3d 196 (11th Cir. 1977), and of this Court in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 329 (1987), and is unsupported by the legislative history or any other case?

3. Where the legislative history of the religious exemption of Title VII requires

organizations considered "religious" to be "wholly owned by the religious order" or a "wholly church supported organization" and since mere "affiliations" are insufficient under § 702 (a), and respondent is controlled by a board independently elected by its members and not receiving money from nor is it controlled by synagogues or any religion sect, did the Third Circuit contradict the legislative history by granting the religions exemption by ignoring the funding and control issues and measuring the "religiosity" of Respondent, though a court is not competent to declare religious orthodoxy?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported as *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007), and is set forth in the Appendix beginning at A-1. The order of the Court of Appeals for the Third Circuit denying the petition for rehearing is not reported and is set forth in the Appendix beginning at A-49. The order and opinion of the United States District Court for the Eastern District of Pennsylvania granting the Respondent's motion for summary judgment is not reported and is

set forth in the Appendix beginning at A-50. The order and opinion of the United States District Court for the Eastern District of Pennsylvania on rehearing granting Repondent's motion for summary judgment is not reported and is set forth in the Appendix beginning at A-71.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, which is the subject of the instant Petition, was entered on September 19, 2007 (A-1). The Petitioner timely filed a petition for rehearing with the Court of Appeals, which was denied in an order entered on October 16, 2007 (A-49). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 42, § 2000e-1, provides, in parts relevant to this Petition, as follows:

(a) **Inapplicability of title to certain aliens and employees of religious entities.** This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation,

association, educational institution, or society of its activities.

STATEMENT OF THE CASE

Petitioner Linda LeBoon ("LeBoon") filed this action under Title VII, 42 U.S.C. § 2000e, claiming that she was terminated by her former employer, Respondent Lancaster Jewish Community Center Association ("LJCC") because of her religious beliefs (she is an evangelical Christian), and for opposing race discrimination. The District Court did not reach the merits of LeBoon's claim that her termination occurred because of her religious beliefs and practices or because she voiced opposition to discrimination against others. Instead, LeBoon's claims were dismissed without any hearing because the courts below concluded, in a way that conflicts with the rulings of other courts and over the dissenting opinion of Circuit Judge Marjorie O. Rendell, that LJCC is a "religious corporation, organization or institution" exempt from the coverage of Title VII under 42 U.S.C. § 2000e-1(a).

This Court should grant the instant Petition to resolve the conflict among the circuit courts over the scope of Title VII's religious organization exemption identified in Judge Rendell's dissenting opinion and allow LeBoon a fair hearing on her claims of discrimination.

LeBoon was employed as a bookkeeper for LJCC, a nonprofit corporation located in Lancaster County, Pennsylvania. LJCC's stated mission was to "enhance and promote Jewish life, identity and continuity." (A-3). Its § 501 (c)(3) application of November 30, 2003, states that its purpose on November 30, 2003 is to "provide and foster culture, social, physical, recreational and educational well-being and to preserve spiritual and cultural values of Judaism through its program." Its purpose is not to proselytize Judaism. Robert Matlin, its board chairman and corporate designee, said its purpose was to advance Jewish identity and continuity, and that it is not religious. The mission and purpose of LJCC is to celebrate Jewish culture. LJCC espouses Jewish values: 1) healing the world, 2) helping those in need, and 3) tolerance of other faiths. In Charitable Organization Registration Statements filed with the Commonwealth, its stated purpose is "to provide educational, recreational, social, cultural and human services to all members of the community."

LJCC was not open only to Jews, and the majority of some programs had non-Jews attending. Neither Board nor Staff members were required to sign a statement of faith or statement of conformance to a mission, and employees were overwhelmingly Gentile (A-23). Its employee handbook and policy statement, in effect from 1998-2002 bans discrimination on the basis of religion. Its agreements with the United Way and the Office of Aging ban religious discrimination. Its bylaws

mention "sensitivity to Jewish concerns" but nowhere mentions religious purpose or synagogue input. Its preschool consists of all religions. It does not teach Judaism, but Jewish values. It had diversity content.

Non-kosher foods are served by LJCC. No mashgiach ensured foods were kosher after 1999. Non-kosher food, including ham, was served. When mashgiach Marilyn Klein resigned in 1999 (A-21) she wondered, "why it was necessary to have a Kosher Kitchen...?" After Klein resigned, LJCC never hired another mashgiach (A-21).

LJCC's 1998-1999 Annual Report reveals that its mission is to develop a cohesive Jewish community. Its website, on March 10, 2004, stated that its mission is to sustain a Jewish community. Nowhere does it state that its mission is religious Jews are not favored over Gentiles for board membership. Non-Jews are on the Board. On August 8, 1946, it obtained tax-exempt status as an educational organization. Upon dissolution, LJCC's assets are not required to be paid to a religious organization or Jewish group, but to a § 501(c)(3) organization.

LJCC's budget was funded by five or six sources, including the United Way. No synagogue provided funding. According to one LJCC representative, funds in the amount of $10,000 - $20,000 came from non-Jewish organizations, $30,000-50,000 from the United Way and $20,000-

30,000 from Jews and non-Jews. Half of the $200,000 programming budget comes from non-Jews. It rented out its facilities to Jewish and non-Jewish organizations. On one occasion, it rented space to a Hindu group for meetings (A-23).

A fully independent board, not synagogues or rabbis, controls the organization. The bylaws do not grant rabbis voting power, and the idea of LJCC programs taking place at synagogues was rejected. Rabbis are non-voting board members.

LeBoon also presented substantial evidence that her termination was the result of religious discrimination in violation of Title VII. It is undisputed that LeBoon is an evangelical Christian (A-51). In 1998, LJCC's Executive Director, Ted Busch, ordered LeBoon to remove a screen saver from her computer that read "protect me, O God, for in thee I put my trust", telling her that others might be offended. Busch also told LeBoon she must refrain from trying to convert people the Christianity and that she was not allowed to give Christmas cards to colleagues. Busch stated "stating "Jews do not write about Moses so why should you write about Jesus Christ?" Busch also told LeBoon that a Messianic Jew could not be a member of LJCC.

Evidence presented below also showed that while two Jewish employees were allowed to receive paid vacation before working for LJCC for a full year, LeBoon was not given paid vacation until after her one-year anniversary (A-51).

In January 2002, an organization called Messiah Truth Project, the goal of which is to counter efforts to convert Jews to Christianity, gave a seminar at LJCC, gave a seminar at LJCC and was given logistical support by LJCC without charge. One week before she was terminated, she attended a Jews for Jesus concert at her church. She saw there the local head of the Messiah Truth Project and spoke with him. One week later, LeBoon was terminated (A-54). An LJCC receptionist testified that she overheard Natalie Featherman, LeBoon's supervisor, tell board members that the Messiah Truth Project's leader had reported to Featherman that LeBoon was at the Jews for Jesus concert; Featherman derided LeBoon about this and indicated she did not trust LeBoon (A-54).

The parties filed cross-motions for summary judgment, which were presented to a magistrate judge. In its original order and opinion, the magistrate judge granted LJCC judgment on LeBoon's religious discrimination claim, determining that LJCC was a "religious corporation" exempt under 42 U.S.C. § 2000e-1. The magistrate judge emphasized that 75-80% of LJCC's funding came from a Jewish organization and that rabbis were ex officio members of LJCC's board (A-59). Thereafter, the magistrate judge vacated this order in favor of LJCC because it was in error with respect to the funding percentage; in fact, only 12.4% and 21.07% of LJCC's funding came from the particular Jewish organization (A-73). Nonetheless, the magistrate

judge again granted summary judgment to LJCC on the basis that it is primarily a religious organization (A-80).

On appeal, the Court of Appeals for the Third Circuit affirmed on this issue, with Circuit Judge Rendell dissenting. The majority opinion noted that Title VII does not define what constitutes "a religious corporation, association, educational institution or society," but that all the relevant characteristics of the organization must be considered to determine whether its purpose and character are primarily religious (A-16). It identified the following characteristics as supporting LJCC's claim to the Title VII exemption: (1) its mission is to enhance and promote Jewish life, identity, and continuity (A-17); (2) it espouses Jewish values, although these values are universal; (3) three local rabbis play advisory roles in its management; (4) it receives funding from local synagogues and Jewish organizations, although it was financially independent of the synagogues (A-18); (5) it maintained close ties with the local synagogues, although it endeavored not to be identified with any of them, allowing the synagogues' literature in its facility (A-19); (6) its building was rededicated in 1998 at Hanukkah by three local rabbis and mezuzahs were affixed on the premises (A-20); and (7) it observed Jewish holidays in some of its activities (A-20).

The majority opinion wrote as follows:

> To summarize, the LJCC saw itself as a center for the local Jewish community, identified itself as Jewish through the mezuzah on its doorway, relied on coreligionists for financial support, and offered instructional programs with a Jewish content. The Jewish religious calendar provided the rhythm for the LJCC's yearly (and even weekly) activities; the three area rabbis were involved in management decisions, including the search for an executive director; and the Board of Trustees began meetings with Biblical readings and remained acutely conscious of the Jewish character of the organization. These characteristics of the LJCC, taken together, clearly point to the conclusion that the LJCC was primarily a religious organization.

(A-22). It went on to specifically reject the contrary decision in *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610 (9th Cir. 1988), that only those institutions with extremely close ties to organized religions would be covered, churches and entities similar to churches being the paradigm.

Judge Rendell wrote a lengthy dissent, characterizing the majority's reasoning as a "hybrid-scattershot test" that "disregard[s] basic canons of statutory interpretation, invite[s] ill-advised judicial forays into the minutiae of private religious practice

and, worst of all, sanction[s] discriminatory employment decisions that go far beyond those Congress intended to exempt from Title VII." (A-38).

Because the phrase "religious corporation, organization or institution" is not defined by Title VII, Judge Rendell held that any analysis must begin with the legislative history, which "makes clear that Congress intended the phrase 'religious corporation' to mean those orgnizations funded or controlled by a religious group." (A-39, 40). The dissent cited to Congressional debate over the interplay of the exemption at issue here for religious corporations (§ 702(a) of the Civil Rights Act of 1964) and a separate exemption for religiously-affiliated educational institutions (§ 703(e)(2)) (A-41 to -43). That debate showed that the educational institution exemption was enacted only because Congress believed that the religious corporation exemption was limited to organizations that were wholly church supported and not merely affiliated with a religion.

Judge Rendell wrote as follows:

> Therefore, the distinction between § 702(a) and § 703(e)(2) is that the former requires an extremely close nexus between the entity and the religion while the latter requires a lesser showing. . . . Thus, § 703(e)(2) applies only to an entity that is "in whole or in substantial part, owned, supported, controlled or managed by a particular

> religion," while § 702(a) requires a showing that the entity *is more than* "in substantial part, owned, supported, controlled or managed by a particular religion." This leaves very little room for an organization financially or structurally independent of a religious order to avail itself of the § 702(a) exemption.

(A- 43, 44). Examining LJCC under this standard, Judge Rendell had "no doubt that it does not qualify under § 702(a)." LJCC was not governed by a synagogue and it was not financially supported by a religious entity. The dissent also pointed out that even though the panel majority was averse to trying to decide whether certain beliefs and practices are central to a faith, "this is exactly the sort of scrutiny that the majority applies to the LJCC, giving us a five-page analysis of the particulars of the Center's commitment to Judaism — an analysis exemplified by its pronouncement that 'the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen.'" (A-47).

REASONS FOR GRANTING THE WRIT

This Court should grant the instant petition in order to resolve the split among the Circuit Courts concerning the proper scope of Title VII's "religious corporation" exemption that is created by the

decision below. The panel majority candidly admitted (A-25, 26) that its decision to exempt LJCC from LeBoon's Title VII claim was contrary to the Ninth Circuit's decision in *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610 (9th Cir. 1988), which refused to apply the "religious corporation" exception to an employer that was not a church or otherwise controlled by a religious entity.

The decision at issue here also conflicts with *Fike v. United Methodist Children's Home, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). The court there held that even though the employer, a home for orphans, was established by the Methodist Church in order to inculcate Christian values to these children, the operation of the home had changed over the years. The court noted that children were no longer required to attend church services. Moreover, the Board of Trustees operated wholly independent of the Methodist Church, and the home was a corporation separate and apart from the church. *Id.* at 289. Rejecting the applicability of the exemption, the court wrote as follows:

> While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and a charitable one, it is not necessarily a religious one. For an organization to be considered "religious" requires something more than a board of trustees who are members of a church.

> The Court, therefore, holds that for the purposes of the exemption in § 2000e-1 the United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization.

Fike, 547 F. Supp. at 290.

Similarly, in *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993), the court reiterated, in accordance with *Townley,* that § 2000e-1's exception is not a broad one and does not exempt an institution that is merely affiliated with a religious organization. Reviewing the reported cases construing the exemption, the court wrote as follows:

> In view of the narrow reach of the § 2000e-1 exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church. *See Little v. Wuerl*, 929 F.2d 944 (parochial school operated by parish); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (school wholly owned and operated by Assembly of God Church); *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (sex discrimination by a church); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (affiliated with and

> overseen by Seventh Day Adventist Church; published only religious materials); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A 1981) (owned and operated by Southern Baptist Convention); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (owned and operated by Mississippi Baptist Convention)[.]

Kamehameha Sch./Bishop Estate, 990 F.2d at 461, n. 7.

This reading is consistent with this Court's decision concerning the exemption in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Without expressing any disagreement, this Court noted that the lower court had applied a test for determining whether a gymnasium operated by the Church of Latter Day Saints looked first at "the tie between the religious organization and the activity at issue with regard to such areas as financial affairs, day-to-day operations and management." *Id.* at 332, n. 6. The exemption was found applicable only because the gymnasium was "intimately connected" to the Church financially and in matters of management. *Id.* at 332. *See also Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (university was covered by the § 702(a) exemption where it was founded as a theological institution, its trustees must be Baptist, its largest single source of funding was from the Baptist Convention, and the

university reports financially to both the Convention and the Alabama Baptist State Board of Missions).

Like Judge Rendell in this case, the *Townley* court reviewed legislative history to divine the meaning of the exemption contained in 42 U.S.C. § 2000e-1(a). This is in accord with this Court's directive that "Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we first look to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

That history clearly indicates that the phrase "religious corporation" means organizations funded or controlled by a religious group. Under § 702(a), organizations with an educational purpose were not to be exempt. Rep. Purcell offered an amendment that would create the exception now located in § 703(e)(2) and stated "generally the church-affiliated schools and colleges are not protected by these two attempts to exempt them. Almost without exception, the term 'religious corporation' would not include church-affiliated schools. . . . Actually most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education." *EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3197 (1968).

Rep. Roberts inquired about whether a religious orphanage in his district would be

considered exempt under § 702(a). In response, Rep. Roosevelt asked whether "the organization . . . [was] *wholly owned* by [the] religious order." *Id.* at 3201. When Roberts responded that it was, Roosevelt said that it would "unquestionably" be exempt under § 702(a). *id.* Rep. Celler, then Chairman of the Judiciary Committee and instrumental in the drafting of the Civil Rights Act, said the orphanage would fall under § 702(a) "[i]f it [was] a *wholly church supported* organization, that is, a religious corporation that comes under section [702(a)]." *Id.* at 3204,

Thus, "[t]he consensus was that [religious corporations] were not protected [under § 702(a)] if they were merely 'affiliated' with a religious organization." *Townley*, 859 F.2d at 617. Because § 702(a) already exempted religious "educational institution[s]," there would have been no need to create a new section if Congress already intended § 702(a) to encompass relationships in which schools or colleges were not actually owned or controlled by a formal religious organization. The distinction between § 702(a) and § 703(e)(2) is that the former requires an extremely close nexus between the entity and the religion while the latter requires a lesser showing. *Fike*, 547 F. Supp. at 290 n.3 (describing the § 703(e)(2) exemption as the "more lenient exemption" of the two). Thus, § 703(e)(2) applies only to an entity that is "in whole or in substantial part, owned, supported, controlled or managed by a particular religion," while § 702(a) requires a showing that the entity *is more than* "in substantial

part, owned, supported, controlled or managed by a particular religion." This leaves no room for an organization financially or structurally independent of a religious order to avail itself of the § 702(a) exemption.

There is no doubt that LJCC does not qualify under § 702(a). With respect to governance, LJCC, during the relevant time period, was not run by a synagogue, but by a board independently elected by the Center's members. While the rabbis from three local synagogues attended board meetings, they only "played an advisory role," serving as "honorary, non-voting members" of the Board. With respect to financial assistance, there is no evidence, nor has LJCC contended, that any of the local synagogues gave LJCC any money in any of the years at issue. Instead, LJCC sustained itself largely by dues and income from the rental of its facilities. The only support it received from an arguably "religious" organization was, as the majority points out, from the Lancaster Jewish Federation. LJCC has not argued that the Federation was akin to a synagogue. Therefore, far from being more than "in substantial part, owned, supported, controlled or managed by a particular religion," LJCC was an independent entity not controlled by any religious sect while it employed LeBoon and cannot now use § 702(a) to shield itself from her suit.

The majority decision below found LJCC to be entitled to the exemption "because its structure and purpose" are primarily religious (A-15). But the

majority discusses neither structure nor purpose; instead, it catalogued Jewish attributes of LJCC's daily operations, such as the features of its programming, its observance of the Sabbath, its pre-school curriculum and the extent to which the Jewish calendar "provided the rhythm" of its activities. This approach is entirely too nebulous, as pointed out in Judge Rendell's dissent. Moreover,

> the majority offers a series of caveats, which dictate that a religious corporation may avail itself of § 702(a) and still "engage in secular activities," fail to conform to "the strictest tenets" of its faith, declare its intention not to discriminate even while doing just that, and, finally, hire persons who subscribe to other faiths while reserving the right to fire those same employees, solely on the basis of their religion, should it choose to do so at some point in the future.

(A-46, 47).

The approach used by the majority is contrary to the principle that "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). This is the sort of scrutiny that the court applies to the LJCC: providing a five-page analysis of the

particulars of the Center's commitment to Judaism – an analysis exemplified by its pronouncement that "the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen."

By adopting a test that turns on the attributes of LJCC's religious practice, the majority below mistakenly assumed that it has the competence to sort through the activities of a religiously inclined organization and pick out those that are meaningful and those that are not. Courts have declined to do this. *See Africa v. Pennsylvania*, 662 F.3d 1025, 1030 (3d Cir. 1981) ("Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy."); *DeHart v. Horn*, 227 F.3d 47, 55-57 (3d Cir. 2000) (reluctance to evaluate the particulars of religious practice). It is not practical, desirable and is unnecessary given Congress's intent.

Congress intended § 702(a), 42 U.S.C. § 2000e-1(a), to cover only those entities that, unlike LJCC, are controlled by a religious sect. *Townley*, 859 F.2d at 617 ("All assumed that only those institutions with extremely close ties to organized religion would be covered [by § 702(a)]. Churches, and entities similar to churches, were the paradigm."). The failure of the majority below to follow the intent of Congress in applying the exemption is a fundamental error that not only created uncertainty in the application of Title VII, but deprived LeBoon of her day in court on substantial claims that she was the

victim of religious discrimination. The instant petition should be granted to rectify both the conflict in the law and the injustice done to LeBoon.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that the Petition be granted.

Dated: January 14, 2008

Respectfully submitted,

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APPENDIX

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Opinion of the United States Court of Appeals for the Third Circuit entered September 19, 2007 A-1

Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing entered October 16, 2007 A-49

Order and Opinion of the United States Magistrate Judge for the United States District Court for the Eastern District of Pennsylvania entered December 16, 2004 A-50

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Order and Opinion on rehearing of the United States Magistrate Judge for the United States District Court for the Eastern District of Pennsylvania entered December 16, 2004 A-71

Order of the United States Magistrate Judge for the United States District Court for the Eastern District of Pennsylvania denying rehearing entered December 16, 2004 A-81

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2073

LINDA LEBOON,

Appellant.

v.

LANCASTER JEWISH COMMUNITY CENTER ASSOCIATION

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 04-cv-00430)
Magistrate Judge: Hon. Jacob P. Hart

Argued on September 26, 2006

Before: RENDELL, CHAGARES and ROTH, Circuit Judges

(Opinion Filed September 19, 2007)

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OPINION

ROTH, Circuit Judge:

In this employment discrimination case, a former employee of the Lancaster Jewish Community Center claimed discrimination on the basis of religion (evangelical Christianity) and retaliation for protected EEO activity. The District Court granted summary judgment in favor of the employer.

We first find that we have jurisdiction to hear the appeal although it was filed over 30 days after

the docketing of the District Court's summary judgment opinion and order; because the District Court did not comply with the separate-document rule, the employee had 180 days from the date of docketing to file her appeal. Second, we affirm the District Court because (a) during the relevant period the Lancaster Jewish Community Center qualified as a "religious corporation, organization, or institution" exempted from the religious discrimination provisions of Title VII; and (b) the employee has not produced sufficient evidence of a casual link between her alleged EEO activity and her termination. Finally, we hold that the District Court did not abuse its discretion in denying the employee's motion to reopen discovery after she had filed a motion for summary judgment.

I. Factual and Procedural Background

Plaintiff-appellant Linda Leboon, an evangelical Christian, was employed as a bookkeeper by the Lancaster Jewish Community Center Association (LJCC) from November, 1998, until August 30, 2002, when she was terminated.[1]

The LJCC was a non-profit corporation located in Lancaster County, Pennsylvania. Its stated mission was to "enhance and promote Jewish life, identity, and continuity." During the relevant time period it was managed by a Board of Trustees, a

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[1] At the beginning of 2004, the LJCC merged with the Lancaster Jewish Foundation; the resulting entity is the Jewish Community Alliance of Lancaster.

number of committees, and an executive director. Its bylaws provided that the rabbis of the three area synagogues serve *ex officio* as non-voting members of the Board.

The LJCC operated a variety of programs, including a summer camp and preschool, and published a newspaper, the *Lancaster Jewish News*. It held events for various Jewish holidays, including a Hanukkah dinner. Its funding came from a variety of sources, including an average of 16.5% annually from the Lancaster Jewish Federation during the time of LeBoon's employment. It also received aid from the United Way for certain programs. The remaining sources of revenue were membership dues, program fees, rents, and donations from individuals and synagogues. Membership was open to Jews and Gentiles alike.

At the beginning of 2002, the LJCC hired Natalie Featherman as the new interim Executive Director. It is essentially undisputed that the LJCC was in serious financial trouble when Featherman took over — just one month later, the LJCC held a retreat to discuss money issues.[2] LeBoon admits to not trusting Featherman and also stated that her relationship with Featherman began to deteriorate in the spring of 2002 because of a memo Featherman

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[2] LeBoon attempts to argue that the LJCC was in better financial condition than it says it was by pointing to year end financial numbers. The record reflects, however, that the numbers looked better than they really were because the LJCC received an advance on the subsequent year's funds.

wrote directed at two other LJCC employees. LeBoon further stated that Featherman had generally poor relations with the entire LJCC staff.

In March, 2002, a custodian named Troy Rollman was terminated. LeBoon testified she opposed his termination because she believed it was motivated by a disability that resulted in a speech impediment. On May 30, 2002, Featherman terminated Sandy Simms, an African-American employee at Lancaster's Office of Aging, who performed receptionist duties at the LJCC. Simms had failed to arrive at work the previous day and never alerted the LJCC that she would be absent. LeBoon claims, with the support of a co-worker's affidavit, that she complained to Featherman that Simms was fired because of her race.

As the spring of 2002 turned to summer, the LJCC's financial prospects did not get any warmer. According to the LJCC, Featherman concluded that LeBoon's position (a full-time bookkeeper) was unnecessary and could be performed by another co-worker. On August 30, 2002, three months after Simms' discharge and six months after Rollman's, Featherman fired LeBoon.

LeBoon filed suit in federal court alleging religious discrimination, retaliation, and wrongful discharge in violation of Pennsylvania's public policy. As relevant for our purposes, she claimed that she was terminated because she is a Christian and Featherman learned that LeBoon had attended a

Jews for Jesus concert a few days before her termination, or, alternatively, in retaliation for LeBoon's complaints about the terminations of Rollman and Simms.

With the consent of the parties, the District Court referred this case to the Magistrate Judge to conduct all proceedings pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. On December 16, 2004, the Magistrate Judge granted the LJCC's motion for summary judgment and denied LeBoon's cross motion for summary judgment. As to LeBoon's claim of religious discrimination, the Magistrate Judge found that it was precluded by Title VII's exemption of religious corporations from the prohibition against religious discrimination. The Magistrate Judge also dismissed LeBoon's retaliation claim because she failed to establish evidence from which a reasonable jury could infer causality. Finally, the Magistrate Judge dismissed the state law claim for lack of federal jurisdiction.

On December 23, LeBoon filed a motion for reconsideration. In its response, the LJCC conceded that the decision had been based in part on a manifest error of fact regarding the percentage of the LJCC's funding that came from the Lancaster Jewish Federation Campaign. On January 14, 2005, the Magistrate Judge entered an order vacating the order of December 16, "so that the Court may reconsider this matter." After reconsidering the case in light of the correct facts, the Magistrate Judge once again determined that the LJCC was a religious

organization exempted from the religious discrimination provisions of Title VII and reissued an order on February 17, 2005, granting the LJCC the same relief it provided in its December 16, 2004, order.

Approximately a week later, LeBoon filed a second motion for reconsideration. The motion was a verbatim copy of the motion for reconsideration filed after the Magistrate Judge's December 16, 2004, ruling. The Magistrate Judge denied this second motion for reconsideration on March 11, 2005. LeBoon filed her notice for appeal on April 4, 2005.

II. Discussion

A. Jurisdiction

The trial court had jurisdiction pursuant to Title VII of the Civil Rights Act of 1964 and 28 U.S.C. § 1331. The LJCC contests our jurisdiction of the appeal, however, on the grounds that LeBoon's notice of appeal was untimely. We have jurisdiction to review our own jurisdiction when it is in doubt, *see Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995), and find that we have appellate jurisdiction under 28 U.S.C. § 1291.

The LJCC argues that we lack jurisdiction of LeBoon's appeal because LeBoon did not file a notice of appeal within 30 days of the Magistrate Judge's February 17, 2005, order granting, for a second time, the LJCC's motion for summary judgment. *See* Fed.

R. App. P. 4. LeBoon responds that her appeal is timely because her second motion for reconsideration, filed on February 25, 2005, tolled the 30-day limit to file an appeal; since the Magistrate Judge did not rule on that second motion until March 11, 2005, her April 4, 2005, notice of appeal was within the 30-day deadline. Although we question whether a litigant can toll the time for appeal by filing a second, essentially identical motion for reconsideration of a final order, we need not decide the issue. The reason for this is the Magistrate Judge's failure to comply with the separate-order requirement of Federal Rule of Civil Procedure 58. Under Rules 58(b) and 79(a), LeBoon had 180 (not 30) days to appeal from the order of February 17, 2005; thus her appeal, noticed on April 4, was timely.

Under Federal Rule of Appellate Procedure 4(a)(1)(A), notices of appeal must generally be filed "within 30 days after the . . . order appealed from is entered." However, "if Federal Rule of Civil Procedure 58(a)(1) requires a separate document," the judgment is considered entered "when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs: [1] the judgment or order is set forth on a separate document, or [2] 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a)." Fed. R. App. P. 4(a)(7)(A)(ii). Thus, if a certain order is subject to the separate-document requirement of Federal Rule of Civil Procedure 58 and no separate document exists, an appellant has

180 days to file a notice of appeal — 150 for the judgment to be considered "entered," plus the usual 30 days from the entry of judgment.

Federal Rule of Civil Procedure 58(a)(1) requires every judgment and amended judgment to be set forth in a separate document unless it is "an order disposing of a motion . . . (D) for a new trial, or to alter or amend the judgment, under Rule 59; or (E) for relief under Rule 60." Fed. R. Civ. P. 58(a)(1). To summarize the convoluted procedural history again, the Magistrate Judge initially ruled on cross-motions for summary judgment on December 16, 2004. On December 23, LeBoon filed a motion for reconsideration, pointing out a factual error in the court's opinion; in its response, the LJCC conceded that the decision had been based in part of a manifest error of fact. Consequently, on January 14, 2005, the Magistrate Judge entered an order vacating the order of December 16, "so that the Court may reconsider this matter." On February 17, 2005, t the Magistrate Judge issued an Opinion and Order that again denied LeBoon's motion for summary judgment and granted LJCC's.

Although at first blush the February 17 Order could be understood as merely ruling on LeBoon's Rule 59 motion for reconsideration, it is clear that in fact its primary junction was to dispose of the cross-motions for summary judgment, which were again pending because the earlier order ruling on them had been vacated. Thus the February 17 Order was subject to the separate-order rule. *See* Fed. R. Civ.

Pro. 58 advisory committee notes (2002 amendment) (when the disposition of a post-judgment motion results in an amended judgment, the separate-document rule applies to the amended judgment); *Employers Ins. Of Wausau v. Titan Int'l, Inc.*, 400 F.3d 486, 489 (7th Cir. 2005) (when a post-judgment motion is granted, and therefore produces an amended judgment, the amended judgment must be set forth on a separate document).[3]

Since the February 17 Order was subject to the separate-order requirement of Rule 58, we next ask whether it complied with Rule 58. If it did not, LeBoon's appeal is timely, because she filed a notice of appeal within 180 days from the docketing of the inadequate order.

No magic words are necessary to satisfy the separate document rule; for instance, an "order's denomination as an 'order,' rather than a 'judgment,' does not mean that it fails to satisfy the separate document requirement." *Local Union No. 1992, IBEW v. Okonite Co.*, 358 F.3d 278, 285 (3d Cir. 2004). Rather, an order is treated as a separate document if it satisfies these criteria: (1) it must be self-contained and separate from the opinion, (2) it must note the relief granted, and (3) it must omit (or at least substantially omit) the trial court's reasons for disposing of the claims. *Id.; In re Cendant Corp. Securities Litig.*, 454 R.3d 235, 241 (3d Cir. 2006).

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[3] The LJCC concedes this. LeBoon, inexplicably, contests it.

The February 17 Order easily satisfies the second and third criteria.[4] Because it is not "self-contained and separate from the opinion," however, it does not satisfy the first. In *Cendant*, we explained that although the separate-document requirement does not mean that the judgment must necessarily be distinct from another document, it means "the judgment must be set forth in a document that is independent of the court's opinion or decision, regardless whether that opinion takes written form." *Id.* at 242. To be independent of the court's opinion, an order must be separately titled and captioned, not paginated consecutively to the opinion or memorandum, not stapled or otherwise attached to the opinion, and must be docketed separately. *See id.* at 241; *Local Union No. 1992*, 358 F.3d at 284-85. The February 17 Order is set forth in a document titled "ORDER AND OPINION." The document contains only one caption and one signature line and is consecutively paginated throughout. The judgment portion of it appears about three-quarters of the way down page 14 of the 15-page document

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[4] The February 17 Order reads:

> a. Plaintiff's Motion for Summary Judgment is DENIED;
> b. Defendant's Motion for Summary Judgment is GRANTED with regard to Plaintiff's Claims under 42 U.S.C. § 2000(e);
> c. This case is ORDERED DISMISSED for lack of federal jurisdiction. JUDGMENT IS ENTERED in this case in favor of Defendant. The clerk of Court is hereby directed to close this case for statistical purposes.

and is separately headed "ORDER." The entire document was docketed as "OPINION AND ORDER." Thus the order does not satisfy the separate-document rule. Consequently the judgment set forth in it should be considered "entered" under Fed. R. App. P. 4(a)(7)(A)(ii) 150 days after February 17, 2005 (the day it was docketed), and LeBoon had 30 days after that to file her appeal. Fed. R. App. P. 4(a)(1)(A).[5]

The final question regarding the timeliness of LeBoon's appeal is whether she was entitled to the additional 150 days to file an appeal or whether, as the LJCC argues, she lost the protections of the separate-document rule by clearly signaling that she understood the February 17 Order as a final judgment subject to appeal. The LJCC contends that LeBoon waived the application of the separate-document rule by filing a motion for reconsideration of the February 17 Order, eventually appealing the order, and by stating at oral argument, through counsel, that she understood the February 17 Order to be the final judgment. We disagree.

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[5] Although LeBoon's appeal was filed before 150 days had elapsed (and thus before the formal entry of judgment), we are not prevented from entertaining it. *See* Fed. R. App. P. 4(a)(2) ("Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment of order — is treated as filed on the date of and after the entry"); Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.")

It is clear that a litigant can waive the application of the separate-document rule in the sense that she may file a valid appeal without waiting for the lapse of 150 days from the docketing of a faulty judgment, *i.e.*, before the faulty judgment has been formalized by the passage of the time period contemplated by Rule of Appellate Procedure 4(a)(7)(A). *Bankers Trust Co, v. Mallis*, 435 U.S. 381 (1978) (*per curiam*). The LJCC's position, however, is that when a litigant signals that she understands that a final judgment has been filed despite the order's failure to comply with the separate-document rule, she must file an appeal within 30 days of the faulty judgment or lose her ability to appeal altogether. This is a dubious argument. *See United States* v. *Indrelunas*, 411 U.S. 216, 221-22 (1973) (*per curiam*) (although the Government had clearly signaled its understanding that a stipulation for damages was the final judgment, the separate-document provision must be "mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered" and therefore the Government's appeal was timely); *Gregson & Assocs. Architects v. Gov't of the Virgin Islands*, 675 R.2d 589 (3d Cir. 1982)(*per curiam*) (holding appeal was timely although the appellant admitted it had understood a faulty judgment to the final); Fed. R. App. P. 4(a) advisory committee notes (2002 amendments) ("[i]n drafting new Rule 4(a)(7)(B) [which provides that appeals filed before the lapse of the 150 days that convert a faulty judgment into a final one are valid], the Committee has been careful to avoid phrases such as 'otherwise timely appeal' that might imply an

endorsement" of the rule in a minority of the circuits that appellants who waive the separate-document requirement must file an appeal within 30 days of the entry of the "faulty" judgment).

Even if it were possible to waive the protections of the separate-document rule, LeBoon did not do so here. Waiver is "the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 407 U.S. 725, 733 (1993). It is all too obvious from LeBoon's pleadings that she was unaware she could avail herself of an additional 150 days because of the formal inadequacy of the February 17 Order. At most, she could have *forfeited* her right, *see id.*; we decline to hold, however, that this court is deprived of jurisdiction over an appeal through a litigant's unknowing forfeiture of the additional time granted her by the Rule s of Civil and Appellant Procedure, and find instead that LeBoon's April 4 notice of appeal was timely.[6]

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[6] LeBoon's Notice of Appeal refers only to the Order of March 11, 2005, and not to the February 17 Order. This technical inadequacy, however, does not in itself deprive us of jurisdiction over the appeal from the underlying order on the summary judgment motions. *See Matute v. Procoast Nav. Ltd.*, 928 F.2d 627 (3d Cir. 1991) (although appellant filed notice of appeal from his motion for reconsideration and did not state his intention to appeal from the underlying dismissal, the formally deficient filing did not result in a loss of the right to appeal; it was clear in context that appellant intended to appeal from the underlying order and not simply from the denial of his motion for reconsideration), *overruled on other grounds by Neely v. Club Med Mgmt. Svcs., Inc.*, 63 R.3d 166 (3d Cir. 1995); *Town of Norwood, Mass. V. New England Power Co.*, 202 F.3d 408, 415 (1st Cir. 2000) (if the post-judgment motion addressed the same

B. Religious Organization Exemption

The Magistrate Judge granted summary judgment to the LJCC on Leboon's claim of religious discrimination because it found that the LJCC was a "religious organization" exempted from compliance with the religious discrimination provisions of Title VII by Section 702 of the Civil Rights Act of 1964. Leboon argues the LJCC was not a religious organization under the statute at the relevant time because it lacked financial or administrative ties with a synagogue and its nature and purposes were primarily cultural, not religious. The LJCC responds that although some of its activities may have been secular in nature, its Jewish mission and orientation qualified it as a religious organization. We hold that the LJCC was entitled to the protection of Section 702 during the period under scrutiny because its structure and purpose were primarily religious.

Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987). It provides that Title VII "shall not apply . . . to a

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issues decided in the underlying judgment and the district court relied on the judgment in ruling on the post-judgment motion, the issues decided in the underlying judgment are properly before the court of appeals, even if the notice of appeal fails to designate the underlying judgment).

religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a).

The statute does not define what constitutes "a religious corporation, association, educational institution, or society"; as the Ninth Circuit Court of Appeals has put it, "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). Over the years, courts have looked at the following factors: (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists. *See Samford v. Kilinger*, 113 F.3d 196 (11th Cir. 1997); *EEOC v. Kamehameha*

Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993); *Townley*, 859 F.2d at 618-19 (9th Cir. 1988); *EEOC v. Mississippi College*, 626 F. 2d 477 (5th Cir. 1980).

It is apparent from the start that the decision whether an organization is "religious" for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case. For instance, although the absence of a proselytizing effort may be a factor under certain circumstances, it will have no significance with a non-proselytizing religion — or thus with a determination whether a Jewish organization is religious. *Cf. Kamehameha*, 990 F.2d at 463 (listing as a factor leading to the conclusion that defendant schools were not entitled to the religious exemption that they had "explicitly disavowed any effort to convert non-Protestant students"). With this caveat in mind we proceed to the analysis.

The LJCC is a non-profit organization. Its Articles of Incorporation and its Bylaws state that its mission is "to enhance and promote Jewish life, identity, and continuity." During the relevant period (defined by LeBoon herself as 1998 to 2002), the walls of the LJCC's lobby carried its mission statement, which was to "develop, involve, and sustain a cohesive Jewish community through identity, education, and cooperation for all ages."

The LJCC's corporate designee testified that the LJCC "espouse[d] Jewish values" although "the Jewish values [it] espouse[d] are universal." These values include "Tikkun olam," meaning healing the world, "Tzadakah," meaning doing the right thing, and "Rachamim," meaning tolerance of other faiths. The LJCC attempted to teach these values in various ways; for instance, a certain charity drive involving the collection of pennies was described as being "designed to get children involved in tzadakah."

The rabbis from the three local synagogues played an advisory role in the LJCC's management. Under the LJCC's bylaws, they served as honorary, non-voting members of the Board of Trustees. When the LJCC held a retreat in February 2002 to discuss its financial troubles, all three rabbis attended. Minutes of the Executive Committee and Personnel Committee meetings show that Natalie Featherman's contract as Executive Director was not renewed for the reason, among others, that she did not "have the confidence of the leaders of the synagogues and other organizations." The rabbis and presidents of the three local synagogues were involved in the search for a new executive director.

Although the LJCC was financially independent from the local synagogues (as the majority of its budget came from "programming services and rentals"), both the synagogues and local Jewish organizations gave it instrumental financial support. The synagogues assisted with fundraising

and the Lancaster Jewish Federation campaign contributed between 15 and 17% of the LJCC's budget annually. The extent to which the JLCC expected to be supported by coreligionists is shown by the fact that it named the different donor levels with Hebrew words. In order to be considered a "Zahav" ("gold")-level donor to the LJCC, a person had to contribute $613 – as many dollars as the commandments in the Hebrew Bible. *See* Cecil Roth, *The Standard Jewish Encyclopedia* 1331 (1959) (entry for "Mitzvah").

While endeavoring not to be identified with any one of the three local synagogues, the LJCC maintained close and active ties with them and other Jewish organizations. The LJCC strove to serve as a "clearing house" for local Jewish people and kept literature from all three area synagogues. Reciprocally, the synagogues distributed the LJCC's information. The synagogues, and particularly the rabbis, also provided programming input and were involved in the LJCC's celebrations of Jewish holidays. One local synagogue, Congregation Shaarai Shomayim, built a Sukkah (a temporary structure used during the holiday of Sukkot) in the LJCC's family park and was involved in a Hanukkah dinner in 1999. The Jewish women's organization Hadassah held its annual Rabbi's Forum at the LJCc at least until 2003, when it decided to hold it at one of the local synagogues because of its deteriorating relationship with Natalie Featherman. In early 2002 the LJCC hosted a meeting of the "Messiah Truth

Project," an organization that aims to combat the conversion of Jews to Christianity.

Jewish religious belief played a significant role in the life of the LJCC. In 1998, at Hanukkah, the LJCC's building was rededicated by the rabbis of the three local synagogues, and the rabbis "ceremonially attached [a] mezuzah to the door of the Social Hall." A mezuzah is a scroll inscribed with certain verses from the Torah which the Jews are commanded by the Torah to affix on every doorway. *Standard Jewish Encyclopedia* 1314. The LJCC also observed the Jewish Sabbath and, on at least one occasion, stood by this religious duty against its financial interest — at the end of 2001, despite its financial woes, the Board unanimously decided not to allow a certain organization to rent the facilities for a holiday fair because it did not wish to host a profit-making activity on the Sabbath. Board meetings from 1998 also describe plans for a "Melavveh Malkah," which is the "concluding Sabbath meal." *Standard Jewish Encyclopedia* 1292.

Several of the LJCC's activities involved observance of the Jewish religious calendar, although these activities did not necessarily involve holy services. During the relevant time, Board meetings frequently began with a reading from the Torah related to that week in the Hebrew calendar. The center held events for Sukkot, Purim, Hanukkah, and Yom HaShoah, a holiday in remembrance of the Holocaust, when prayers were said for the dead.

The LJCC kept a kosher kitchen, although non-kosher foods could be brought into the building. In 1999, the LJCC's *mashgiach*, or person in charge of supervising compliance with kosher laws, resigned. It is undisputed that a new *mashgiach* was not hired. However, the LJCC worked with one of the rabbis to create a kosher committee to supervise the kitchen, and attempted to ensure that functions would be kept kosher for the comfort of those who strictly observed the kosher mandate.

To the extent that the LJCC also served as an educational institution, the balance of Jewish, as opposed to other content, in the curriculum was in flux during the period under scrutiny. Indeed, when the new director, Natalie Featherman, was hired, part of her mandate was to "put[] an emphasis on the Jewish in Jewish Community Center." For instance, Featherman introduced a Judaic curriculum into the preschool program, which had been non-denominational prior to mid-2002, and supplemented it by a parallel enrichment program with a Judaic base.

The LJCC's corporate designee testified that the preschool held "Tot-Shabbat," a weekly celebration of the Sabbath for toddlers, involving the distribution of challah (a traditional bread) and the recitation of blessings. The Notes to the Financial Statements for 2001 and 2002 state that "[i]n keeping with the philosophy of the Jewish Community Center, [the preschool] integrated[d] the Jewish holidays as they [arose] throughout the year.

[It] also explore[d] multicultural themes and each child's unique cultural background."

Judaic programming was available for adults through the Holocaust Memorial Library and Center for Diversity and Tolerance Education. The Center also held Beit Midrash (study hall) meetings with rabbis and other Jewish educators. In 1999, the LJCC ran a program called "Jewish U," a Jewish education series. The record does not clarify the content of this series. For a time, the B'nai B'rith Youth Organization, a world-wide organization for Jewish teens, met at the LJCC. It stopped doing so when the group's advisor resigned from the position.

To summarize, the LJCC saw itself as a center for the local Jewish community, identified itself as Jewish through the mezuzah on its doorway, relied on coreligionists for financial support, and offered instructional programs with a Jewish content. The Jewish religious calendar provided the rhythm for the LJCC's yearly (and even weekly) activities; the three area rabbis were involved in management decisions, including the search for an executive director; and the Board of Trustees began meetings with Biblical readings and remained acutely conscious of the Jewish character of the organization. These characteristics of the LJCC, taken together, clearly point to the conclusion that the LJCC was primarily a religious organization.

LeBoon argues that despite all this the LJCC is not sufficiently religious to qualify for Section 702

protection. She points out that it engaged in secular activities, such as lectures and instructions with no religious content, and once even rented space to a Hindu group for meetings , that its employees were overwhelmingly Gentile, that it accepted United Way funds with the promise that it would not discriminate in the funded programs, and that it failed to ban non-kosher foods. None of these factors is decisive.

First, religious organizations may engage in secular activities without forfeiting protection under Section 702. *See Hall v. Baptist Memorial Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (where a college has clear religious overtones, the fact that it trains its students for health care, a secular activity, does not deprive it of Section 702 protection); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 977-78 (D.Mass.1983) (a newspaper with a close relationship with the Christian Science Church was allowed to discriminate in favor of co-religionists although itself out as an objective and unbiased reporter of world news). Of course the religious organization exemption would not extend to an enterprise involved in a wholly secular and for-profit activity. *See Townley*, 859 F.2d at 610 (declining to extend Section 702 protection to a corporation manufacturing industrial equipment that claimed a religious exemption on the basis of its owners' intent to pervade the activity with their religious belief).

Second, religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection. *See*

Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds"); *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 715-16 (1981) (declining to hold that a certain individual's belief was not "religious" for purposes of a free exercise claim because there existed interfaith differences of interpretation). For example here, the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen.

Third, religious organizations may declare their intention not to discriminate, as the LJCC did to the United Way and in its employee handbook, without losing the protection of Section 702. *See Hall*, 215 F.3d at 625 (Section 702 exemption could not be waived, even if the entity invoking it had "represented itself as being an equal opportunity employer and . . . received federal funds").

Fourth, the organization need not enforce an across-the-board policy of hiring only coreligionists. *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *Samford v. Killinger*, 113 F.3d 196, 199-200 (11th Cir. 1997 (no need for an educational institution to engage in a "strict policy of religious discrimination" to be entitled to the exemption).

We disagree with LeBoon's contention that the LJCC's willingness to welcome Gentile members and

even to host Hindu services is incompatible with the view that the LJCC was a religious organization. Indeed, these characteristics are clearly tied to some of the Jewish principles that guided the LJCC – tolerance toward other faiths, healing the world, and doing the right thing.[7] We will not deprive the LJCC of the protection of Section 702 because it sought to abide by its principles of "tolerance" and "healing the world" through extending its welcome to non-Jews.

We also decline LeBoon's invitation to hold that the LJCC is a center for Jewish culture rather than religion for the reasons explained the Magistrate Judge, namely, because to engage in such an analysis would risk precisely the sort of state entanglement with religion that the Supreme Court has repeatedly warned against. *See Amos*, 483 U.S. at 343 (Brennan, J., concurring) (noting that the determination whether a particular activity of a religious organization is religious or secular "results in considerable ongoing government entanglement in religious affairs"); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 04-cv-430, 2005 WL 387642 at *3n.3(E.D. Pa. Feb. 17, 2005).

Finally, we are not persuaded by the Ninth Circuit Court of Appeals' suggestion, on the basis of legislative history, that Section 702 should be

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[7] Although the LJCC itself acknowledges that some of these principles exist outside Judaism, to the extent that the LJCC followed them as Jewish principles does not make them any less significant.

understood to cover little more than formal houses of worship. *Townley*, 859 F.2d at 618. The court based this assertion on one of the congressional debates that led to the passage of the Civil Rights Act of 1964, which it summarized as follows:

> In 1963, the House Judiciary Committee drafted H.R. 7152, the bill which was the basis of much of the Civil Rights Act of 1964. Title VII of the bill included a section that stated the title would not apply to a "religious corporation, association, or society." . . . [During the House debate] Representative Purcell proposed amending H.R. 7152 to allow an educational institution to discriminate on the basis of religion if the institution was wholly or partly supported or managed "by a particular religion or by a particular religious corporation, association, or society," or if the institution's curriculum was directed toward the propagation of a particular religion. *EEOC Legislative History of Titles VII and XII of the Civil Rights Act of 1964*, at 3197 (1968). . . .
>
> [A]n issue in the debate was whether such institutions were already protected by the "religious corporation" exemption. The consensus was that they were not protected if they were

> merely "affiliated" with a religious organization. . . .
>
> Congress's conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.

Townley, 859 F.2d at 617-18.

The amendment was introduced and eventually approved. We do not, however, believe that this one bit of legislative history supports the assertion in *Townley* that Congress assumed only "[c]hurches, and entities similar to churches" would be protected by the "religious corporation, association, and society" language (*i.e.*, by what is now Section 702) without the proposed amendment to the bill. *Id.* at 618. First, as *Townley* itself acknowledges, "[the] debate is far from comprehensive," and although some congressmen expressed concern that the courts would interpret the existing "religious corporation, association, or society' language narrowly and not extend the exemption to religiously affiliated colleges and schools, the perception that the language was insufficient was hardly unanimous. Indeed, the discussion was so far from enlightening on the intended beneficiaries of the protection as to prompt one Congressman to comment that "if there ever was a legislative history

which became confused in less than an hour, this is it. . . . [E]very shade of opinion has been ventured on this language which is conceivable." *EEOC Legislative History* at 3204. Second, the debaters' concern overwhelmingly regarded the ability of a *secular* educational institution teaching *secular* subjects, but affiliated with or owned by a religious order of organization, to hire preferentially persons of the same faith. *See, e.g., EEOC Legislative History* at 3199 (Ouachita Baptist College), 3202 (Catholic colleges and schools). It is a large leap from acknowledging this concern, whether or not well-founded, to concluding that the Congressmen believe the existing bill to protect virtually nothing beyond formal houses of worship. In fact, the concern expressed during the debate is largely irrelevant to the question we face today, since the LJCC is readily distinguishable from the examples of schools colleges that pepper the transcript. The LJCC's main purpose was to "enhance and promote Jewish life, identity, and continuity," not to teach calculus or chemistry, whether or not in a religious atmosphere. Thus we do not find the legislative history helpful and decline to follow the conclusion drawn from it in *Townley*.

Because, during the period under consideration, the LJCC's primary purpose was religious, we will affirm the District Court's dismissal of LeBoon's claim of religious discrimination.

C. Retaliation Claim

LeBoon argues the Magistrate Judge erred in granting summary judgment for the LJCC on her claim of retaliation under Title VII. The Magistrate Judge held that although LeBoon's evidence, considered in the light most favorable to her, supported the conclusion that she had opposed conduct by the LJCC that she believed to be unlawful discrimination, she had not produced enough evidence to allow a seasonable fact-finder to find that she was fired because of her complaints. LeBoon contends that she has produced sufficient evidence of a causal connection. We agree with the Magistrate Judge that LeBoon cannot survive summary judgment on her claim of retaliation.

To establish a prima facie case of retaliation under Title Vii, a plaintiff must show that (1) she engaged in protected activity, (2) the employer took a materially adverse action against her, and (3) there was a causal connection between the protected activity and the employer's action. *Moore v. City of Philadelphia*, 461 F.3d 331, 341-42 (3d Cir. 2006).[8]

LeBoon clearly suffered a materially adverse action, since she was terminated from her job. She has also proffered evidence that she engaged in

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[8] In order to show that she was terminated because of her complaints about the firing of her coworkers, LeBoon need not prove that retaliation was the *sole* reason for the LJCC's decision; she must prove, however, that was a *determinative factor* of the employment decision, meaning that she would not have been terminated but for her protected activity. *Watson v. SEPTA*, 207 F.3d 207, 215 (3d Cir. 2000); *Caver v. City of Trenton*, 420 F.3d 243, 267 (3d Cir. 2005).

activity protected by Title VII (namely, coworker Deborah Brown's affidavit that she witnessed LeBoon complaining to Featherman, at the end of May, 2002, that a certain African-American employee had been terminated because of her race).[9] The question is whether LeBoon has placed enough evidence in the record to create a genuine issue of material fact as to whether there was a causal link between her complaints and her termination. We hold that she has not.

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[9] Protected activity for purposes of a prima facie case of retaliation does not mean a formal action against the employer. "Opposition" to discrimination under the retaliation provision "can take the form of informal protests of discriminatory employment practices, including making complaints to management." *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir.2006) (internal citation and quotation marks omitted.) In addition, the plaintiff making a retaliation claim need not prove the merits of the underlying discrimination complaint, but only that a reasonable person in these circumstances would have concluded that the employer was engaging in discriminatory conduct. *Id.* at 344. Here, LeBoon's belief was not clearly unreasonable, although the terminated co-worker had taken an unauthorized day off immediately before being fired.

LeBoon also claims that she complained to Featherman and others about six months before her termination about the firing of an employee who may have had a speech impediment, custodian Troy Rollman. There is no support for this in the record beyond LeBoon's own testimony; in ay event, any claim of retaliation based on this alleged complaint would fail for the same reason as the claim related to the termination of LeBoon's African-American coworker.

LeBoon argues that the causal link is established by the temporal proximity of her complaint to her termination (three months) and by several episodes in the intervening periods that show that her relationship with Featherman deteriorated after her complaint. The LJCC disagrees.

We consider "abroad array of evidence" in determining whether a sufficient causal link exists to survive a motion for summary judgment. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 284 (3d Cir. 2000). Where the temporal proximity between the protected activity and the adverse action is "unusually suggestive," it is sufficient standing alone to create an inference of causality and defeat summary judgment. *See Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (temporal proximity alone, when "very close," can in some instances establish a prima facie case of retaliation); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989) (reversing summary judgment in favor of the defendant where plaintiff had been discharged tow days after his employer's receipt of his EEOC claim). Where the temporal proximity is not "unusually suggestive," we ask whether "the proffered evidence, looked as a whole, may suffice to raise the inference." *Farrell*, 206 F.3d at 280 (internal citation and quotation marks omitted). Among the kinds of evidence that a plaintiff can proffer are intervening antagonism or retaliatory animus, inconsistencies in the employer's articulated reasons for terminating the employee, or any other evidence in the record sufficient to support the inference of retaliatory

animus. *Id.* at 279-81. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

Although there is no bright line rule as to what constitutes unduly suggestive temporal proximity, a gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment. *See Clark County School Dist.*, 532 U.S. at 273 (citing favorably *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997), which rejected such an inference where the events were three months apart); *Andreoli v. Gates*, 482 F.3d 641, 650 (3d Cir. 2007) (five-month time period between employee's complaint and first adverse action was, without additional evidence, insufficient to raise an inference of causation). Thus we ask whether there is sufficient evidence in the record for a reasonable fact-finder to determine that LeBoon's termination was caused by her complaint about the termination of her coworker.

LeBoon has presented evidence of her strained relationship with Featherman during the last several months of her employment. It is undisputed, however, that LeBoon started having difficulties with Featherman almost immediately upon Featherman's appointment as Executive Director. In January, 2002, she expressed he rdisagreement with the

LJCC's hosting of a Messiah truth Project meeting; in February, she complained to Featherman about accounting irregularities (and also reported them to a Pennsylvania hotline); also in February, she was relieved of the facility management aspects of her position; in April or May, 2002, the security of the business office, for which LeBoon was responsible, was compromised, and as a result LeBoon established a home office; LeBoon and Featherman disagreed as to whether Featherman authorized this. In May, LeBoon reported to the Board Featherman's decision to offer another employee, Stefan Dabrowski, additional compensation in the form of a "reimbursement" of the health insurance premium that the LJCC did not have to pay because he had opted out of insurance, and also Featherman's backdating of a memo to the personnel file about this decision. Featherman was forced to explain herself to the Board in a memorandum. Also in May, the Joint Personnel Committee sent a memorandum to the Board expressing its concern with Featherman's actions, several of which were reported by LeBoon. The memorandum memorializes another instance of conflict between Featherman and LeBoon, arising from LeBoon's request that Featherman formalize a reprimand to another employee. Again in the same month, the LJCC received payment of a grant meant for an elevator in response to invoices sent by Featherman, and LeBoon called the grantor to state the elevator work had not yet begun. The grantor wrote Featherman to return the money on June 3, only a few days after LeBoon's African-American coworker was terminated; LeBoon testified that

Featherman must have known LeBoon had caused the request for the grant to be returned.

None of the events after LeBoon's complaint about the termination of her coworker in late May, 2002, show a qualitatively different relationship between LeBoon and Featherman. The record includes evidence that Featherman asked LeBoon to report to Dabroski rather than directly to her (a change which, according to LeBoon herself, was in response to her insistence on reporting Featherman's irregularities to the Board); that LeBoon again complained to an official of the LJCC about an irregularity involving an employee's time sheets, which caused Featherman to tell LeBoon to stop "snooping around her employees"; and that, two weeks before being fired, LeBoon wrote a memo to Featherman recording her compliance with Featherman's request that Dabrowski be paid as yet unearned vacation pay. The record also shows that another employee, Deborah Brown, resigned in June, explaining in her letter of resignation that Featherman had told Brown she could no longer trust her because Brown reported her grievances regarding Featherman to the Personnel Committee.

Thus, although the evidence in the record clearly shows a tense relationship between LeBoon and Featherman, it does not sustain the inference that it was caused by LeBoon's protected activity. Rather, there is a clear pattern of LeBoon's complaining to Board members about Featherman or insisting on respect for formalities and Featherman's

displeasure at these reports and limitations on her authority even before any mention of possible discriminatory conduct on the part of the LJCC; there are also clear indications that LeBoon was not the only person who suffered the consequences of complaining to the Board about Featherman.

LeBoon argues that she can show causation because of inconsistencies in the LJCC's explanations for her termination.[10] She contends that the LJCC did not save any money by terminating her, since it paid those who took over her tasks more than it saved.

There can be no serious dispute that the LJCC was in dire financial straits during the relevant period. The Board minutes reflect an increasing preoccupation with the LJCC's chances of survival; at the Board meeting held four before LeBoon's termination, the treasurer reported the LJCC did not "have enough to get through another month," and the possibility of declaring bankruptcy was considered. As to the redistribution of LeBoon's duties, after LeBoon's termination the bookkeeping was done by Featherman, Dabroski, and some volunteers; it was not until the merger creating the Jewish Alliance of

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[10] Although an examination of the employer's proffered legitimate reason for the adverse action is frequently delayed until the second and third parts of the familiar *McDonnell Douglas* burden-shifting framework in pretext cases, "evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other." *Farrell*, 206 F.3d at 286.

Lancaster that to different employees took over the duties that had been LeBoon's. Although financial difficulties in themselves do not explain why LeBoon in particular was fired, the LJCC's explanation is not so inconsistent or incongruous, in the absence of any other evidence, as to give rise to an inference that LeBoon was terminated because of her protected activity.

We agree with the District Court that no reasonable jury could find that LeBoon's termination was caused by her complaint about the termination of an African-American coworker, and will affirm the grant of summary judgment on LeBoon's retaliation claim.

D. The District Court's Denial of LeBoon's Motion to Reopen Discovery

The final question before us is whether the District Court erred by denying LeBoon's motion to reopen discovery to allow the deposition of David Goodman, a person affiliated with the Messiah Truth Project, after he had been located.

A district court's denial of discovery is reviewed for abuse of discretion. *United States v. Hedaithy*, 392 F.3d 580, 605 (3d Cir. 2004). Here, LeBoon moved to reopen discovery in February, 2005, over two months after the close of discovery. At the time of her motion, LeBoon had filed a motion for summary judgment, indicating that, from her perspective, the record was sufficient to warrant

relief in her favor. *See Bencivenga v. Western Pa. Teamsters & Employees*, 763 F.2d 574, 576 (3d Cir. 1985). In addition, she did not file an affidavit indicating that she needed additional discovery to respond to the LJCC's motion for summary judgment, as provided under Federal Rule of Civil Procedure 56(f). *See Radich v. Goode*, 886 F.2d 1391 (3d Cir. 1989) (district court did not abuse discretion by granting summary judgment despite appellant's contention that more discovery was needed when appellant failed to comply with Rule 56(f) and specify with particularity what discovery was needed). We conclude, therefore, that the Magistrate Judge did not abuse his discretion in denying LeBoon's motion.

IV. Conclusion

For the reasons stated above, we will affirm the District Court's order denying LeBoon's motion for summary judgment and granting summary judgment to the Lancaster Jewish Community Center.

LeBoon v. Lancaster Jewish Community Center Assoc.,

05-2073

RENDELL, *Circuit Judge*, dissenting.

This case presents an issue of statutory interpretation. As the majority points out, Title VII "does not define what constitutes 'a religious

corporation, association, educational institution, or society.'" Maj. Op. at 12. Our task, therefore, is to determine what Congress meant when it employed those words and provided that the hiring and firing decisions of such entities should be immune from suits alleging discrimination on the basis of religion. Rather than inquire into Congress's intent, however, the majority refers with broad brush to the approaches taken by other courts, fails to give serious consideration to the relevant legislative history, and embraces a hybrid-scattershot test that examines whether the Lancaster Jewish Community Center ("LJCC") kept a kosher kitchen, affixed a mezuzah to its doorway or recorded its board meetings using the Hebrew calendar. From the particulars of the LJCC's operation, the majority concludes that the LJCC is Jewish enough to qualify as a "religious corporation."

I suggest that the majority's analysis and ultimate ruling disregard basic canons of statutory interpretation, invite ill-advised judicial forays into the minutiae of private religious practice and, worst of all, sanction discriminatory employment decisions that go far beyond those Congress intended to exempt from Title VII. Therefore, I must respectfully dissent from this aspect of the majority's opinion.[11]

I.

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[11] I do not disagree with the majority's rulings with respect to parts I, II.A, II.C and II.D.

We come to this issue *tabula rasa*. As I noted above, Congress did not include within Title VII a definition of the term "religious corporation." *See* Maj. Op. at 19-21. Nor have we yet had occasion to consider the meaning of that phrase. Indeed, a survey of our sister courts of appeals reveals that "[t]here is little precedent on the meaning of 'religious corporation' under [§ 702(a)]." *Fike v. United Methodist Children's Home of Va., Inc.*, 547 F. Supp. 286, 290 (E.D. Va. 1982); see also *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610, 618 (9th Cir. 1988) (noting that "the case law on this question is not very helpful"). Nevertheless, this lack of authority does not diminish our responsibility to interpret "religious corporation" in a way that "give[s] effect to Congress's intent." *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001).

It is axiomatic that, when the meaning of a phrase employed by Congress is undefined and unclear, we must begin our efforts to determine its meaning with a review of the relevant legislative history. "The Supreme Court has repeatedly stated: 'Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we first look to the statutory language and then to the legislative history if the statutory language is unclear.'" *Murphy v. Dalton*, 81 F.3d 343, 350 (3d Cir. 1996) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)); *see also United States v. Gregg*, 226 F.3d 253, 257 (3d Cir. 2000) ("Where the statutory language does not express Congress's intent unequivocally, a court traditionally refers to the legislative history

and the atmosphere in which the statute was enacted in an attempt to determine the congressional purpose."); *Dir., Office of Workers' Comp. Programs v. Sun Ship, Inc.*, 150 F.3d 288, 291 (3d Cir. 1998) ("If the statutory language is ambiguous, we look to legislative history to determine congressional intent."). The majority fails to take even this most basic step, referring in conclusory fashion to the analysis of the legislative history supplied by another court. Maj. Op. at 19-21. A thorough analysis of the legislative history makes clear that Congress intended the phrase "religious corporation" to mean those organizations funded or controlled by a religious group.

II.

The current version of Title VII includes two exemptions pertinent to this case. The first is located in § 702(a) and provides that the anti-discrimination provisions of Title VII "shall not apply . . . to a religious corporation, association, educational institution, or society." The second is located in § 703(e)(2) and provides that

> it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion is such school, college, university, or other educational institution or institution of learning is,

> in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

While Title VII's drafters included the § 702(a) exception in the first draft of H.R. 7152 — "the bill which was the basis of much of the Civil Rights Act of 1964," *Townley*, 859 F.2d at 617 — they did not include the § 703(e)(2) exception. Fearing that § 702(a) would not include situations in which an educational institution had aligned itself with a particular faith, but was *not* fully owned or supported by that faith, Representative Graham Purcell offered an amendment that would create the exception now located in § 703(e)(2). At issue in the floor debate over the Purcell Amendment was whether it was necessary — that is, whether the exemption located under § 702(a) was already sufficient to cover the relationships of concern to Rep. Purcell. Or course, Rep. Purcell believed that it was not and, in support of his argument, said:

> In my study of the bill, I discovered that generally the church-affiliated schools and colleges that are not protected by these two attempts to exempt them.

> Almost without exception, the term "religious corporation" would not include church-affiliated schools unless this definition should received the most liberal possible interpretation by the courts. Actually most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education.

EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3197 (1968) (emphasis added).[12]

Later in the debate, Representative Herbert Ray Roberts rose to inquire about the status of a religious orphanage in his district and whether it would be considered exempt under § 702(a). In response, Representative Franklin Delano Roosevelt, Jr. rose and asked whether "the organization . . . [was] *wholly owned* by [the] religious order." *Id.* at 3201 (emphasis added). When Representative Roberts responded that is was, Representative Roosevelt said that it would "unquestionably" be exempt under § 702(a). *Id.* Representative Roberts once again to inquire about the same orphanage and,

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[12] Notably, the LJCC has represented itself as an "educational organization" before the Internal Revenue Service, *see* Appx. at 1058, and as an entity created "[t]o provide educational, recreational, social, cultural, and human services to all members of the community," before the Commonwealth of Pennsylvania Department of State, *see id.* at 1080.

in response, Representative Emanuel Celler, then Chairman of the Judiciary Committee and instrumental in the drafting and passage of the Civil Rights Act, rose to say that the orphanage would fall under § 702(a) "[i]f it [was] a *wholly church supported* organization, that is, a religious corporation that comes under section [702(a)]." *Id.* at 3204 (emphasis added). In short, "the consensus was that [religious corporations] were not protected [under § 702(a)] if they were merely 'affiliated' with a religious organization." *Townley*, 859 F.2d at 617.

Eventually, Congress passed the Purcell Amendment, confirming that it understood the § 703(e)(2) exemption to require a lesser degree of association between an entity and a religious sect than what would be required under § 702(a). This is made all the more obvious by the fact that, since § 702(a) already exempted religious "educational institution[s]," there would have been no need to create an entirely new section if Congress had already intended § 702(a) to encompass relationships in which schools or colleges were not actually owned or controlled by a formal religious organization. Therefore, the distinction between § 702(a) and § 703(e)(2) is that the former requires an extremely close nexus between the entity and the religion while the latter requires a lesser showing. *See, e.g., Fike*, 547 F. Supp. at 290 n.3 (describing the § 703(e)(2) exemption as the "more lenient exemption" of the two). Thus, § 703(e)(2) applies only to an entity that is "in whole or in substantial part, owned, supported, controlled or managed by a particular religion," while

§ 702(a) requires a showing that the entity *is more than* "in substantial part, owned, supported, controlled or managed by a particular religion." This leaves very little room for an organization financially or structurally independent of a religious order to avail itself of the § 702(a) exemption.

Looking at the LJCC through this lens, there is no doubt that it does not qualify under § 702(a). With respect to governance, the LJCC, during the relevant time period, was not run by a synagogue, but by a board independently elected by the Center's members. As the majority points out, while the rabbis from each of the three local synagogues attended board meetings, they only "played an advisory role," serving as "honorary, non-voting meetings" of the Board. Maj. Op. at 14. With respect to financial assistance, there is simply no evidence, nor has the LJCC contended, that any of the local synagogues gave the LJCC any money in any of the years at issue. Instead, the LJCC sustained itself largely by dues and income from the rental of its facilities. The only support it received from an arguably "religious" organization was, as the majority points out, from the Lancaster Jewish Federation. *See id.* The LJCC does not argue that the Federation was akin to a synagogue. Therefore, far from being more than "in substantial part, owned, supported, controlled or managed by a particular religion," the LJCC was an independent entity not controlled by any religious sect while it employed Linda LeBoon and cannot now use § 702(a) to shield itself from LeBoon's suit.

III.

The majority's discussion of the legislative history misses the point, as it fails to address the concern of the debaters that is relevant to the question before us – namely, the relationship required between an organization and its religion under §§ 702(a) and 703(e)(2). Instead, the majority notes that the representatives were concerned with "the ability of a *secular* educational institution teaching *secular* subjects, but affiliated with or owned by a religious order or organization, to hire preferentially persons of the same faith." Maj. Op. at 20-21. While the purpose of the *amendment* was, undoubtedly, to address the ability of religious schools to hire and fire preferentially, the *debate* explored the extent to which that had already been achieved by § 702(a), and it is this feature of the debate that sheds light on the meaning of that exemption.

Additionally, the majority writes that "the LJCC is readily distinguishable from the examples of schools and colleges that pepper the transcript" of the legislative history. Maj. Op. at 21. The question of whether the LJCC is "readily distinguishable" from the schools and colleges discussed in the debated is irrelevant because the question is not at issue.[13] What is important for our purposed is that the legislative history reveals what Congress understood

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[13] The question would have been relevant had the LJCC sought protection under the § 703(e)(2) exemption, which it did not.

to be the differences between the relevant exemptions, both of which refer to religious schools and colleges. The discussion of whether § 702(a) was sufficient to cover independent religious schools informs the meaning of "religious corporation" since § 702(a) treated both entities in the same way.

The majority's terse discussion of the legislative history robs its analysis of the necessary focus on Congress's intent and consequently infects its ability to craft a coherent and manageable test for determining what constitutes a "religious corporation, association, educational institution, or society." Rather than adopting an approach that analyzes the closeness of the LJCC's formal relationship with a particular religious group, the majority announces at the outset of its discussion that the LJCC is entitled to the § 702(a) exemption "because its structure and purpose" are primarily religious. However, it then proceeds to discuss neither structure nor purpose, but, rather, catalogues Jewish attributes of the LJCC's daily operations, such as the features of the its programming, its observance of the Sabbath, its pre-school curriculum and the extent to which the Jewish calendar "provided the rhythm" of its activities. Maj. Op. at 17. As if this approach were not already sufficiently nebulous, the majority offers a series of caveats, which dictate that a religious corporation may avail itself of § 702(a) and still "engage in secular activities," fail to conform to "the strictest tenets" of its faith, declare its intention not to discriminate even while doing just that, and, finally, hire persons

who subscribe to other faiths while reserving the right to fire those same employees, solely on the basis of their religion, should it choose to do so at some point in the future. Maj. Op. at 17-18.

The majority's test is unwieldy and rooted in neither the text of Title VII nor in the understanding of the Congress that wrote it.

IV.

In sum, Congress understood § 702(a) to cover only those entities that, unlike the LJCC, are controlled by a religious sect. *See Townley*, 859 F.2d at 617 ("All assumed that only those institutions with extremely close ties to organized religion would be covered [by § 702(a)]. Churches, and entities similar to churches, were the paradigm."). However, another serious concern cuts in favor of reading § 702(a) as I suggest, and that is, as even the majority points out, that "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" Maj. Op. at 18 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). Unfortunately, this is exactly the sort of scrutiny that the majority applies to the LJCC, giving us a five-page analysis of the particulars of the Center's commitment to Judaism — an analysis exemplified by its pronouncement that "the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen." *Id.* by adopting a test that turns on

the attributes of the LJCC's religious practice, the majority mistakenly assumes that we have the competence to, and should, sort through the various activities of a religiously inclined organization and pick out those that are meaningful and those that are not. We have previously declined to do so. *See Africa v. Pennsylvania*, 662 F.3d 1025, 1030 (3d Cir. 1981) ("Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy."); *see also DeHart v. Horn*, 227 F.3d 47, 55-57 (3d Cir. 2000) (citing many cases establishing "a consistent and resounding theme" that represents our, and the Supreme Court's, reluctance to evaluate the particulars of religious practice). We should not do so here. It is neither practical nor desirable and, ultimately, unnecessary given Congress's intent.

V.

For these reasons, I would reverse the District Court's order and remand for further proceedings on LeBoon's discrimination claim.

10/16/07

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2073

LINDA LEBOON,

Appellant.

v.

LANCASTER JEWISH COMMUNITY CENTER ASSOCIATION

ORDER

(Scirica, Chief Judge, Sloviter, McKee, Rendell ,Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Hardiman, Jordan and *Roth, Authoring Judge) Denying petition for en banc rehearing by Appellant Linda LeBoon.

Judge Rendell would have granted rehearing, filed. *Honorable Roth's vote is limited to panel rehearing only. (par)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

LINDA LEBOON	:	CIVIL ACTION
	:	
v.	:	
	:	
LANCASTER JEWISH	:	
COMMUNITY CENTER	:	
ASSOCIATION	:	NO. 04-430

ORDER AND OPINION

JACOB P. HART DATE:
UNITED STATES MAGISTRATE JUDGE

I. Introduction

In this action, plaintiff Linda LeBoon challenges the termination of her employment by the Lancaster Jewish Community Center Association ("LJCC"). She has asserted federal claims under Title VII, 42 U.S.C. § 2000(e). The first Title VII count alleges religious discrimination, and the second alleges retaliation for opposing race discrimination. LeBoon has also asserted a state-law claim for wrongful termination in violation of public policy.

Each party has filed a motion for summary judgment. I will now dispose of both motions, denying LeBoon's motion, and granting the LJCC's motion regarding both of LeBoon's Title VII claims.

In addition, since there are no extraordinary reasons for keeping this case in federal court with only a state law issue remaining, I will order the case dismissed in its entirety.

II. Factual Background[1]

LeBoon worked for the LJCC between 1998 and her termination on August 30, 2002. Although she was responsible for a variety of tasks, she is best described as having worked there as a bookkeeper, or business manager. As discussed below, the LJCC is a nonprofit Jewish organization. LeBoon is an evangelical Christian.

During the time LeBoon worked for the LJCC, there were occasions upon which she questioned actions she was asked to take. On one such occasion, on May 31, 2002, LeBoon objected to a direction that she pay Beth Schlesinger, a recently hired employee, advance salary and insurance. Similarly, on July 8, 2002, LeBoon opposed the LJCC's decision to pay unearned vacation salary to an employee named Lisa Valva. LeBoon points out that both Schlesinger and Valva were Jews, and that she, herself, was not permitted to receive paid vacation until she had passed her one-year anniversary with LJCC.

On another occasion, LeBoon challenged a direction to report to the Pennsylvania Unemployment Commission that an individual worked an hour more each weekday than he actually

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[1] These facts are derived from both parties' motions for summary judgment, and the responses and exhibits thereto.

worked, apparently in order to compensate him for five hours of work actually done on a weekend. After LeBoon complained about this to the Vice President of LJCC's Board of Directors, LeBoon claims her supervisor, Natalie Featherman, brought her into her office and told her to "stop snooping around our employees." In her Complaint, LeBoon claimed that she also opposed LJCC's decision to increase Featherman's salary, although she has not shown evidence of this in discovery.

Further, LeBoon has claimed:

> During April, 2002, Plaintiff opposed the actions of [Featherman], Defendant's Executive Director, in terminating the contract of Sandy Simms on the basis or race, since Simms, a black woman, was replaced due to her race to make room for a Jewish bookkeeper who formerly worked at Jewish Family Services. Featherman said she did not want "those kind" working at the front desk, by which she referred implicitly to Simm's race.

Complaint at ¶ 9.

LJCC denies that it terminated Simms because of her race, or to make room for a Jewish bookkeeper, and also denies that LeBoon ever opposed Simms's termination. Ms. Simms has

signed a statement in which she concedes that she took a day off from work without notifying the LJCC, and that Natalie Featherman told her the next day that she would no longer be permitted to work at the LJCC (she was not actually an employee of the LJCC, but, rather, of the Office of Aging):

> [At the time of my termination] I went into Linda's office and directly asked her to intervene on my behalf with Ex. Dir. Featherman. Linda waved her hands and told me that she didn't want to get involved. I did not tell Linda LaBoon that I believed I was discriminated against because of my race AND Linda LaBoon did not tell me that she believed I was discriminated against because of my race. I am not aware that Linda LaBoon opposed the decision to release me.

Statement of Sandra Simms, attached as Exhibit A to Defendant's Opposition to Plaintiff's Motion for Summary Judgment, at ¶¶ 5 and 6.

However, Deborah A. Brown, a former receptionist at the LJCC has signed an affidavit in which she states: "In April, 2002, I heard LeBoon complain to Featherman that Sandy Simms was terminated as my assistant due to her race." Affidavit attached as Exhibit 27.

On January 8, 2002, an organization called the Messiah Truth Project, Inc., gave a seminar at the LJCC. This organization, headed in the Lancaster area by an individual named David Goodman, had as its goal the education of Jews to counter the efforts of Jews For Jesus, and similar movements that specifically seek to convert Jews to Christianity. Apparently, the LJCC offered the Messiah Truth Project some logistical assistance, such as permitting it to make copies on its copying machine without charge.

On August 23, 2002, one week before LeBoon was terminated, she attended a Jews For Jesus concert at her church. There, she saw David Goodman, whom she knew from the LJCC. At Goodman's suggestion, (according to LeBoon), LeBoon introduced Goodman to one of the Jews For Jesus singers.

Olga Jaffae, a receptionist at LJCC, testified that "a couple of days after" LeBoon was terminated, she overheard a conversation in which Natalie Featherman told several LJCC board members that David Goodman had come to the LJCC and told her that LeBoon attended the Jews For Jesus meeting: "Natalie kind of was like making fun of that, you know, attending that meeting. And I think she said that she didn't really trust Linda." Deposition of Olga Jaffae, attached to Plaintiff's Motion as Exhibit 23, at page 12. LeBoon has asserted that Jaffae knew that Goodman came to see Featherman at the LJCC sometime between August 23 and August 30,

2002, and that he waited for Featherman over two hours. However, Jaffae testified that she did not see Goodman come to the LJCC, and did not know when he came. Id. at 13.

The LJCC has taken the position that LeBoon was terminated as a cost-saving measure. It has provided considerable evidence that the LJCC had been suffering such serious financial problems for years that the Board of Directors considered closing the building. LeBoon, however, has questioned the gravity of the LJCC's financial situation. She has also suggested that LJCC did not save money from terminating her because it had to pay other individuals to perform her former duties.

III. Legal Standard for Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as an affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra, at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra, at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, at 323.

IV. Discussion

A. LeBoon's Claim for Religious Discrimination

Section 2000e-2(a) of Title VII provides that an employer may not discharge, or "fail of refuse" to hire an individual or discriminate "with respect to his compensation, terms, conditions, or privileges of employment" because of the individual's race, color, religion, sex or national origin.

Nevertheless, Title VII includes an exception protecting religious entities from suit on the basis of religious discrimination. Section 702 of that law provides:

> This subchapter shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the

> carrying on by such corporation, association, educational institution, or society with its activities.

42 USC § 2000e-1. This passage once permitted exemption from suit only with regard to religious activities. However, it was amended in 1972 to extend protection to all activities of religious organizations. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

The LJCC claims that § 702 exempts it from LeBoon's claim of religious discrimination. I agree. LeBoon argues that the LJCC is not a religious organization of the kind referred to in § 702, primarily because religious services are rarely held there. It is evident from the caselaw, however, that § 702 is not limited to facilities where prayer takes place.

In Amos, supra, the United States Supreme Court found that § 702 permitted a nonprofit gymnasium run by "religious entities associated with The Church of Jesus Christ of Latter-Day Saints" to refuse to hire individuals who were not eligible for membership in the Mormon Church. 483 U.S. at 330. The lower court had found that "nothing in the running or purpose of [the Gymnasium] ... suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." 483 U.S. at

332, n. 7. The lower court also noted that "no contention was made that the religious doctrines of the Mormon Church ... treat physical exercise as a religious ritual." 483 U.S. at 332, no. 7.

The Supreme Court, however, rejected these as a criteria for the application of § 702. Justice Brennan wrote in his concurrence:

> Nonprofit activities ... are most likely to present cases in which characterization of the activity as religious or secular will be a close question. ... This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities.

483 U.S. at 345 (Concurring opinion).

Also relevant is Feldstein v. The Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983), in which the United States District Court for the District of Massachusetts found that the newspaper, owned by the Christian Science Publishing Society, was permitted by § 702 to hire as reporters only members of the Christian Science Church. This was despite the plaintiff's allegation that the Christian Science Monitor was "a highly regarded and impartial newspaper carrying news stories, articles, columns and editorials that are secular in nature and

content." 555 F. Supp. at 977. The court wrote: "A religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith." Id. at 978.

Unlike the entities in Feldstein and Amos, the LJCC is not run by, and is not directly answerable to, any one religious body, i.e., any one synagogue or denomination of Judaism. However, 75-80% of the funding for LJCC during the relevant time period came from the Lancaster Jewish Federation campaign. Matlin Deposition, attached to Plaintiff's Motion as Exhibit 26, at 128. Further, rabbis of the three local synagogues were *ex officio* members of LJCC's board of directors, as they assisted the LJCC in programming and fundraising. Id. at 138.

Moreover, it is evident from a review of the LJCC's activities as reflected in the record, that it seeks to serve and foster the local Jewish community as a whole. The LJCC's mission statement, printed on the cover of its report on its 1998 Annual Meeting, and reportedly "emblazoned" on the walls of the LJCC's lobby, states that it seeks to "develop, involve and sustain a cohesive Jewish Community through Identity, Education and Cooperation for all Ages." Exhibit L to Defendant's Motion at Bates Stamp No. 370. LeBoon has argued that this focus on "identity, education and cooperation" shows that LJCC's mission is not spiritual. However, this fails to take account of the fact that LJCC seeks to sustain a specifically *Jewish* community.

LJCC board minutes also reveal the pervasive Jewish orientation for the organization. In notes from December 21, 1998, the LJCC's yearly Chanukah Dinner is described. Ted Busch (the executive director preceding Natalie Featherman) is noted to have said "that one of the most meaningful parts of the event was the rededication of the building, when all three Rabbis [one from each of the three local synagogues] ceremonially attached the last mezuzah to the door of the Social Hall. ...Each mezuzah had been fitted with a kosher scroll." Id. at Bates Stamp No. 345. Plans for a "Melavah Malka" program are described. Id. at Bates Stamp No. 346. This is described as a "'Seder' for escorting the Shabbat Queen." Id. (The "Shabbat Queen" is not a beauty contest winner — in Judaism, the Sabbath is referred to in liturgy as a queen).

In September 28 1999 Minutes, LJCc members are solicited to volunteer, and to contact potential audience members, fro a Jewish Federation program concerning the plight of Jews in the former Soviet Union. Id. at Bates Stamp No. 372. A community trip to Israel is discussed. Id. at Bates Stamp No. 372, 373. It is also reported that the summer camp had hosted two Israeli shlichim [emissaries] who organized an "Israel Day." Id. at Bates Stamp No. 374.

November 11. 1999 Board Minutes relate that generous donors to the LJCC are referred to as benefactors at the "Zahav" level ("zahav" is the

Hebrew word for "gold"). "Zahav" benefactors contribute $613. This is a number of Jewish significance, since the Hebrew Bible is said to contain 613 commandments. The maintenance of a kosher kitchen at the LJCC was also discussed at that meeting, with the conclusion being that "with a kosher kitchen, and a policy that mandates the use of kosher products for all programs presented by the JCC we were creating an environment where **all** members of the Lancaster Jewish community could feel comfortable participating." Id. at Bates Stamp No. 380-381 (bold in original).

The LJCC's view of its own role is also reflected in January, 2000, notes listing talking points to be used in approaching potential new members: "The JCC is the best point of positive contact between all segments of the Lancaster Jewish community. ... The Center produces Jewish education and cultural programming for the whole community, e.g. Yom HaShoa [Holocaust Commemoration Day], the Chanukah Dinner, community Purim carnival, Jewish U. [a Jewish education program[, etc. ... the JCC is a meeting ground for our own Jewish youth. The JCC is the first point of contact for Jews new to the area. The Center is the place for Jewish seniors to meet at the Friendship Club. ... The JCC is the community connection to Israel." Id. at Bates Stamp 387-388. It is apparent from this that only Jews wee to be solicited as LJCC members.

Later, in October 23, 2000, a board member described some of the LJCC's successes that year as "Jewish Leadership and Jewish U as well as the Teenage Council as well as the Chanukah Dinner, Purim Carnival and most recently the Jewish Food festival." Id. at Bates Stamp 417.

A number of the programs sponsored by the LJCC, such as fitness and self-defense classes, are religion-neutral and open to members of the general public. Indeed, for years, the LJCC ran a secular pre-school program. However, this does not change the underlying purpose and orientation of the organization. In Amos, the lower court had found "that there [was] no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon church or church administration." 483 U.S. 327. The LJCC, which regularly holds Jewish education courses and celebrations of Jewish holidays, is therefore far more religious in its daily activities than the gym found by the United States Supreme Court to be worthy of § 702 protection in Amos. See also Feldstein v. The Christian Science Monitor, supra.

Finally, LeBoon argues that the LJCC could not be a religious organization because it receives some government funding, and has certified to the United Way that it does not discriminate in employment. This argument was rejected by the Court of Appeals for the Sixth Circuit in Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618,

625 (6th Cir. 2000). There, as here, a Baptist-run nursing school "represented itself as being an equal opportunity employer and ... received federal funds." Id. The Hall court, however, found that the § 702 exemption could not be waived. Id.

Similarly, the Court of Appeals for the Third Circuit rejected an argument that a Catholic School waived its right to exemption by knowingly hiring a non-Catholic. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1990). The Court of Appeals held that the § 702 exemption could not be waived, because it is not a privilege, but a right. Id. See also Siegel v. Truett-McConnell College, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1995), *aff'd* 73 F.3d 1108 (11th Cir. 1995) (table) (Baptist college protected by § 702 even if "the College receives far more money from the federal and state government than it does from the Baptist Church", and where the college knowingly hired a non-Christian); but see Dodge v. The Salvation Army, 1980 WL 53857 (S.D. Miss. Jan. 9, 1989) (Salvation Army could not discriminate on the basis of religion in filling a position entirely funded by a targeted federal grant).

Thus, the LJCC, which admittedly receives the bulk of its funding from Jewish sources, and where LeBoon's position was not specifically federally funded, would be found entitled to the § 702 exemption under all of the authority discussed above.

I note, as well, that one study found that 51% of nonprofit organizations which, like the LJCC,

deliver child care services, were religiously affiliated, and of those, 82% received public funds. Paul Taylor "The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Services Efforts" 12 George Mason U. Civ. Rts. L. J. 159 (Spring 2002), citing Stephen V. Monsma, "When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money" 68 (1996). The same survey found that 44% of the religiously affiliated organizations providing child care only hired – or gave preference to – staff who agreed with their religious orientation. Id. This supports my conclusion that the LJCC's funding situation does not affect its religious status.

In sum, I have no hesitation in finding that the LJCC is a religious organization within the meaning of § 702, and is therefore exempt from suit for religious discrimination.[2] I note that this is a

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[2] It is not clear whether LeBoon's claims that Jews were offered more favorable working conditions than non-Jews, as opposed to her claim that she was fired because of her beliefs, would be covered by § 702, which has been used only regarding staffing decisions. Even if they are not covered by § 702, however, these claims would not survive summary judgment: (a) As to insurance coverage, LeBoon admitted that LJCC did not offer COBRA to any of its employees, and that both Jewish and non-Jewish employees were offered continuation coverage under LJCC's insurer. LeBoon Deposition Excerpt, attached as Exhibit P to LJCC's Motion at 98, 99, 113; (b) Although LeBoon argued that Beth Schlesinger, a Jewish employee, was paid in advance, Le Boon is unaware of any time a non-Jewish employee requested advance pay but was denied it. Id. at 337-339, 341; (c) LeBoon admitted that she had no reason to believe that non-Jews were discriminated against in being offered the

potentially significant finding not only for the LJCC, or even for Jewish Community Centers, of which there are many, nationwide. A Google search turned up 4,340,000 hits for the term "Jewish Community Center", but also 2,490,000 for the term "Muslim or Islamic Community Center," 654,000 for "Hindu Community Center" and 577,000 for "Buddhist Community Center." Accordingly, LeBoon's claim for religious discrimination will be dismissed.

B. LeBoon's Claim for Retaliation

In her amended complaint, LeBoon has asserted a Title VII count claiming that she was dismissed in retaliation for opposing the terminations of Mr. Rollman and Ms. Simms, both of which actions LeBoon believed to be discriminatory. To advance a *prima facie* case of retaliation under Title VII, LeBoon is required to show that she engaged in a protected activity, and that she was then subject to an adverse employment action. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000). She must also show a causal link between her protected action and LJCC's adverse action. Id.

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opportunity to receive compensation in lieu of medical insurance, other than the fact she was not offered it. Id. at 349-352; (d) LeBoon admitted that both Jews and non-Jews received mileage reimbursement, and that she is not aware of any non-Jewish employee other than herself who was denied it. Id. at 354-355; and (e) Although LeBoon complained that she was not permitted to take vacation pay until earned, and Stephan Dabrowski was permitted to take vacation pay in advance, Dabrowski is not Jewish. Id. at 356, and Deposition Excerpt of Natalie Featherman, attached as Exhibit F, at 105.

LeBoon has failed to establish the third point. The Court of Appeals for the Third Circuit has directed trial courts to look to "a broad array of evidence", both direct and circumstantial, in lookin for a causal link in a summary judgment motion on a retaliation case. Farrell, supra, at 285. Nevertheless, a plaintiff must show enough to create a genuine issue of material fact. Id. at 280.

Here, the only evidence LeBoon offers is that she protested the discharges and that she was subsequently terminated for a reason the validity of which she disputes. This evidence is not sufficient to establish causation. At the outset, the timing of LeBoon's firing — six months after Rollman was terminated, and three months after Simms was dismissed — is, in the words of the Court of Appeals for the Third Circuit, not unusually suggestive. Krouse v. American Sterilizer Company, 126 F.3d 494, 500 (3d Cir. 1997). Thus, more evidence is required to show a causal link. Farrell, supra, at 280, citing, Krouse supra.

A plaintiff may in some case establish a causal link by showing that the reason the employer gave for terminating her was unlikely or inconsistent. Farrell, supra, citing Waddell v. Small Tube Products, Inc., 799 F.2d 69, 73 (3d Cir. 1986). LeBoon has produced evidence that her termination was not, as LJCC asserted, a cost-cutting measure. However, LeBoon has alleged numerous other reasons why she was dismissed, notably because of

her religious practices. In this circumstance, I believe that some evidence is required to tie LeBoon's termination specifically to her complaints to Featherman about perceived discrimination based on race or disability.

LeBoon has not come forward with this evidence. She does not claim that either Rollman or Simms was ever mentioned to her again. She has not pointed to any evidence that would suggest she was viewed as an unwanted protector of her co-workers' civil rights. She has not alleged or shown a pattern of antagonism that began after she took the alleged protected activity. See Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 288-89 (3d Cir. 2001); Woodson v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997); Robinson v. SEPTA, 982 F.2d 892 (3d Cir. 1993). She has not shown "other evidence gleaned from the record as a whole from which causation can be inferred." Farrell, at 206 F.3d 281.

Thus, even if a jury were to credit LeBoon's version of all facts (LJCC has denied that LeBoon ever complained to Featherman about the alleged discrimination), it could not reasonably connect these specific actions by LeBoon to her termination. Accordingly, LeBoon's retaliation claim cannot survive LJCc's motion for summary judgment.

C. LeBoon's State Law Claim

Absent extraordinary circumstances, a federal trial court will not continue to exercise pendent

jurisdiction over any state claims after federal causes of action are dismissed from a case. Bright v. Westmoreland County, 380 F.3d 729, 751 (3d Cir. 2004). For this reason, LeBoon's state claim will be dismissed as well.

V. Conclusion

For the reasons set forth above, I now enter the following order:

ORDER

AND NOW, this day of December, 2004, upon consideration of Plaintiff's Motion for Summary Judgment, Defendant' Motion for Summary Judgment, and the responses thereto, it is hereby ORDERED that:

a. Plaintiff's Motion for Summary Judgment is DENIED;
b. Defendant's Motion for Summary Judgment is GRANTED with regard to Plaintiff's claims under 42 U.S.C. § 2000(e);
c. This case is ORDERED DISMISSED for lack of federal jurisdiction. JUDGMENT IS ENTERED in this case in favor of Defendant. The Clerk of Court is hereby directed to close this case for statistical purposes.

BY THE COURT:

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JACOB P. HART
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

LINDA LEBOON	:CIVIL ACTION
	:
v.	:
	:
LANCASTER JEWISH	:
COMMUNITYCENTER	:
ASSOCIATION	:NO. 04-430

ORDER

AND NOW, this 14th day of January, 2005, in view of my Order of today vacating my December 16, 2004, decision granting summary judgment in favor of the Defendant, it is hereby ORDERED that Plaintiff's Motion for Reconsideration, docketed in this case as Document No. 60, is GRANTED.

BY THE COURT:

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JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

LINDA LEBOON	:	CIVIL ACTION
	:	
vi.	:	
	:	
LANCASTER JEWISH	:	
COMMUNITY CENTER	:	
ASSOCIATION	:	NO. 04-430

ORDER AND OPINION

JACOB P. HART DATE: February 17, 2005
UNITED STATES MAGISTRATE JUDGE

I. Introduction

Plaintiff Linda LeBoon filed this action under Title VII, 42 U.S.C. § 2000(e), claiming that she was terminated by her former employer, the Lancaster Jewish Community Center Association, ("LJCC") because of her religious beliefs (she is an evangelical Christian), and for opposing race discrimination. On December 16, 2004, after considering cross-motions for summary judgment, I entered judgment in favor of the LJCC on all counts. However, I then granted LeBoon's motion for reconsideration of my dismissal of the claim for religious discrimination in order to correct a manifest error of fact regarding the source of the LJCC's funding.

As explained below, having reconsidered the dismissal of LeBoon's claim of religious discrimination in the light of my new understanding of the facts of this case, I once again conclude that the claim is properly dismissed. Therefore, I will once again order that judgment be entered in favor of the LJCC.

III. Factual Background

In dismissing LeBoon's claim of religious Discrimination, I found that the LJCC was entitled to immunity from suit under 42 U.S.C. § 2000-2(a), known as § 702 of Title VII, as a religious organization. I considered a number of factors which the relevant caselaw had indicated were relevant — among them, the source of the LJCC's funding. I wrote that: "75-80% of the funding for the LJCC during the relevant time period came from the Lancaster Jewish Federation campaign." Opinion of December 16, 2004, at 7.

However, LeBoon pointed out in her motion for reconsideration that the deposition excerpt on which I relied actually stated that the Federation contributed between $75,000 and $85,000 to the LJCC each year during the relevant time period, and not 75-85% of the funding. Plaintiff's Motion for Summary Judgment at Exhibit 26. For that reason, I granted LeBoon's motion for reconsideration, and directed the LJCC to "file a supplementary document setting forth the sources for the entirety of LJCC's

funding during the years between 1998 and 2002, to the extent possible." Order of January 14, 2005.[1]

The material submitted by the LJCC in response to my Order shows that in the years between 1998 and 2001, the Lancaster Jewish Federation provided between 12.44% and 21.07% of the LJCC's funding. Exhibit A to Exhibit 2 to Supplement. Other income came in the form of contribution, grants, membership dues, rentals, and interest. Exhibit B to Exhibit 2 to Supplement. By far the largest single source of income each year, however, was "program services." Id. As I noted in my original opinion on the motions for summary judgment, some of the LJCC's programs were specifically Jewish in orientation, but others were not, and they were open to the general public. December 16, 2004, Opinion at 10.

III. Legal Principles

As explained in my original opinion, Section 702 of Title VII exempts religious organizations from

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[1] I added, and in capital letters, "NO FURTHER SUPPLEMENTARY FILINGS WILL BE ACCEPTED." Nevertheless, the LJCC's supplementary financial date was accompanied by a seven-page Memorandum setting forth legal arguments which were not raised in the original motion. LeBoon has since filed two responses to this Memorandum. In line with my prior Order, and with the legal principles pertaining to a motion for reconsideration, I have not considered any of this new material. See Balogun v. Alden Park Management Corp., Civ. A. No. 98-0612, 1998 WL 962956 at *1 (E.D. Pa. Oct. 1, 1998); Vaidva v. Xerox Corporation, Civ. A. No. 97-547, 1997 WL 732464 at *1 (E.D. Pa. Nov. 25, 1997).

suit on the basis of religious discrimination. 42 U.S.C. § 2000-2a. As amended in 1972, it protects all activities of religious organizations, not just religious activities. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

In deciding whether an entity is entitled to § 702 immunity, "each case must turn on its own facts ... [a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." EEOC v. Townley Engineering & Manufacturing Co., 859 F.2d 610, 619 (9th Cir. 1988).

Amos, supra, is useful in understanding what the United States Supreme Court finds an acceptable quotient of secular activity in an exempt entity. There, the Supreme Court found that § 702 immunity was available to a nonprofit gymnasium, the function of which was in no way connected to religion, but which was operated by "entities associated with" the Mormon Church. 438 U.S. at 330. Justice Brennan wrote in his concurrence that permitting courts to decide which activities of a religion are religious and which secular would involve undue governmental entanglement in religious affairs, explaining:

> Nonprofit activities ... are most likely to present cases in which characterization of the activity as religious or secular will be a close question. ... This substantial potential

> for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities.

483 U.S. at 345 (Concurring opinion).

> Also influential in this regard is Feldstein v. The Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983). There, the United States District Court for the District of Massachusetts found that the Christian Science Monitor could refuse to hire as reporters individuals who were not members of the Christian Science Church, even though the newspaper was considered a "highly regarded and impartial newspaper" in the general community, and published primarily secular news. 555 F. Supp. at 977.

IV. Discussion

It is unquestionable that courts look at funding sources when they seek to determine whether an entity is primarily religious or primarily secular. Amos, supra, at 483 U.S. 332 (where the lower court had found that "the Gymnasium is intimately connected to the Church financially ..."); Feldstein, supra, 555 F. Supp. at 977 ("The Church organization is also involved with the operation of the Monitor in a financial capacity"); EEOC v. Townley, supra, at 859 F.2d 612 (company not religious where "it is not affiliated with or supported

by a church."). However, no court has made funding an essential criteria, or even named it as the most important of the many criteria examined.[2]

I emphasized the Jewish Federation funding in my December 16, 2004, Opinion as showing a link between the LJCC and the greater Jewish community. Nevertheless, it was by no means the only link. In terms of association with Jewish bodies, I noted that, while the LJCC was not connected to or run by one specific synagogue or denomination, rabbis the three local synagogues were *ex officio* members of the LJCC's board of directors, and they assisted the LJCC in programming and fundraising. Opinion of December 16, 2004, at 10. Additionally, the LJCC's mission statement, activities, board minutes, and publications, reflected LJCC's function in serving and fostering a specifically Jewish community. Id. at 8-10.

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[2] A state court reviewing the relevant law found that federal courts have looked at these factors; (1) whether the entity operates for profit or as a nonprofit organization; (2) whether an administrative agency has determined the entity's status; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether the entity represents itself to the church, the public, and the government as a secular or sectarian body; (5) whether the church is intimately involved in the management, day-to-day operations and financial affairs of the entity; (6) whether the church supports or is affiliated with the entity; (7) whether the entity adheres to or deviates from an original religious purpose; and (8) whether the entity conducts religious activities, services, or instruction. Speer v. Presbyterian Children's Home and Services Agency, 847, S.W.2d 227, 235 (Tex. 1993).

The LJCC's mission statement specifies that it seeks to "develop, involve and sustain a cohesive Jewish Community through Identity, Education and Cooperation for all Ages." Exhibit L to Defendant's Motion at Bates Stamp No. 370. Its activities include celebration of Jewish holidays such as Purim and Chanukah, the attachment to each door in the building of a kosher mezuzah, the maintenance of a kosher kitchen, the holding of a "Melavah Malka" program, and numerous education programs on Jewish themes. Id.

Notes of board meetings also revealed a pervasive Jewish orientation. Aside from planning the Jewish activities described above, the board members discussed other events specifically of interest to Jews, such as a community trip to Israel, and a Jewish Federation program about Jews in the former Soviet Union. Id. at 372, 373, 374. Concepts of relevance only to Jews were also employed, such as using Hebrew terms to refer to donors, and asking for donations in the amount of $613, where 613 is a number of Jewish significance.

As I also noted in my December 16, 2004, Opinion, the LJCC's membership drive talking points, as set forth in its January, 2000, board meeting notes, reflected its concept of itself as a specifically Jewish organization. For example, one point was that "The LJCC is the best point of positive contact between all segments of the Lancaster Jewish community." Other points included: "The Center produces Jewish education and cultural

programming for the whole community", "The LJCC is a meeting ground for our own Jewish youth." "The LJCC is the first point of contact for Jews new to the area." and "The Center is the place for Jewish seniors to meet" and "The LJCC is the community connection to Israel." Id. at Bates Stamp 387-388.

Thus, considering the balance of secular and Jewish factors, I once again conclude that, even though Jewish Federation turns out to have been a minor source of income for the LJCC, instead of a major source, the LJCC is primarily a religious institution.[3] Taking the picture as a whole, I repeat my former conclusion that:

> The LJCC, which regularly holds Jewish education courses and celebrations of Jewish holidays, is therefore far more religious in its daily activities than the gym found to be worthy of § 692 protection in Amos.

Id. at 10.

Cases in which § 702 protection has been denied strengthen my conclusion, since they involve

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[3] LeBoon had urged an analysis which would segregate Jewish "cultural" activities from the practice of religion. Clearly, the application of a philosophical distinction such as this would entail exactly the sort of excessive government entanglement in religion warned against by Justice Brennan in his concurring opinion in Amos. And see Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). I am not aware of any court which has subjected Judaism to this analysis.

entities very different from the LJCC. In Fike v. United Methodist Children's Home, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd* 709 F.2d 284 (4th Cir. 1983), a nominally Methodist children's home was found not entitled to the § 703 exemption because "as far as the direction given the day-to-day life for the children is concerned, it is practically devoid of religious content or training as such." 709 F.2d at 290. The LJCC offered considerable religious content and training.

The LJCC stands in even sharper contract to the corporation at issue in EEOC v. Townley Engineering & Manufacturing Co., 859 F.2d 610, 619 (9th Cir. 1988), which was a privately owned, for-profit manufacturer of mining equipment, not affiliated with or supported by a church. 859 F.2d at 619.

On the basis of the foregoing, I once again conclude that LeBoon's claim for religious discrimination is precluded by § 702, since the LJCC is a religious organization.

ORDER

AND NOW, this 17th day of February, 2005, upon reconsideration of Plaintiff's Motion for Summary Judgment, Defendant' Motion for Summary Judgment and the responses thereto, it is hereby ORDERED that:

d. Plaintiff's Motion for Summary Judgment is DENIED;

e. Defendant's Motion for Summary Judgment is GRANTED with regard to Plaintiff's claims under 42 U.S.C. § 2000(e);
f. As previously ordered, this case is ORDERED DISMISSED for lack of federal jurisdiction. JUDGMENT IS ENTERED in favor of Defendant. The Clerk of Court is hereby directed to close this case for statistical purposes.

BY THE COURT:

_____

JACOB P. HART
UNITED STATES
MAGISTRATE JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

LINDA LEBOON	:CIVIL ACTION	
	:	
	:	
v.	:	
	:	
LANCASTER JEWISH	:	
COMMUNITYCENTER	:	
ASSOCIATION	:	NO. 04-430

ORDER

AND NOW, this 11th day of March, 2005, upon consideration of Plaintiff Linda LeBoon's Second Motion for Reconsideration, and Defendant's response thereto, and having observed that LeBoon's motion does not address (a) an intervening change in the controlling law; (b) the availability of new evidence that was not previously available; or (3) the need to correct a clear error of law or fact other than that which was previously corrected, the motion, it is hereby ORDERED that LeBoon's Motion for Reconsideration, docketed as Document No. 71, is DENIED.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

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(2)

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-943

In The
Supreme Court of the United States

LINDA LEBOON,

Petitioner,

v.

LANCASTER JEWISH COMMUNITY CENTER ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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March 19, 2008

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QUESTION PRESENTED

1) Whether the petitioner has failed to present any conflict between the lower court's decision and any decision of this Court or any circuit court of appeals?

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INTRODUCTION

This case involves the scope of Title VII's exemption for religious corporations, associations, educational institutions, and societies. Petitioner, Linda LeBoon ("Petitioner") seeks review of a decision from the Third Circuit Court of Appeals which held that Respondent, the Lancaster Jewish Community Center Association ("the LJCC")[1] was a religious corporation exempt from Title VII under Section 702 of the Civil Rights Act of 1964. Petitioner asserts that there is a conflict among the circuit courts over the scope of Title VII's religious organization exemption and asks this Court to resolve the alleged split. Respondent opposes this petition because there is no such split among the circuits. Respondent further opposes this petition because Petitioner mischaracterizes the decisions of this Court and the court below.

STATEMENT OF THE CASE

The LJCC is a non-profit corporation located in Lancaster, Pennsylvania. The LJCC employed Petitioner, Linda LeBoon, as a bookkeeper from November of 1998 through August of 2002. On or about August 30, 2002, the LJCC eliminated Petitioner's position due to serious financial problems

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[1] On or about January 1, 2004 the Lancaster Jewish Community Center Association and the Lancaster Jewish Federation merged and formed the Jewish Community Alliance of Lancaster. (A-3). The Lancaster Jewish Community Center Association was the entity that employed Petitioner. For the sake of convenience, this brief will generally refer to Respondent interchangeably as "the LJCC" and "Respondent."

that the LJCC was experiencing. Petitioner thereafter filed a federal suit against the LJCC claiming that she was terminated by the LJCC because of her religious belief (she is a self-described evangelical Christian), and for allegedly opposing race discrimination.

Since its inception over fifty years ago, the LJCC's mission has been "to develop, involve, and sustain a cohesive Jewish community through identity, education, and cooperation for all ages." This mission statement is prominently displayed on the walls of the LJCC's lobby. (A-17).[2] Both the Articles of Incorporation and the bylaws of the LJCC state that the organization's mission is ". . . to enhance and promote Jewish life, identity, and continuity. . . ." *Id.* The bylaws of the LJCC contain multiple provisions designed to ensure that a Jewish presence remains on the Board at all times. The bylaws require that rabbis from all three area synagogues serve as honorary, non-voting members. (A-18). All three area synagogues provide input regarding Respondent's programming and additionally assist Respondent in raising funds. *Id.*

Respondent obtains funding for some of its programs from the United Way. (A-4). Otherwise, Respondent obtains funding from private trusts; funds of the previously existing Lancaster Jewish Federation (which has since merged into the LJCC); membership dues; and programs run by Respondent, including its camp, preschool, and rental programs. (A-4).

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[2] References to the appendix are to the appendix to the petition for writ of certiorari.

Respondent also receives contributions from various persons and entities, including the local synagogues. (A-18-19). Although the vast majority of LJCC members are Jewish, individuals of all religious backgrounds are permitted to join the LJCC. (A-4).

Respondent furthers its mission of developing a Jewish community through various community programs. Some of these programs are offered for the youth in the community. For example, the LJCC offers pre-school and camp programs that teach Jewish awareness and values. These values are drawn from The Torah and include such principles as "Tikkun Olam" (healing the world) and "Tzedakah" (charitable giving and compassion towards others). (A-18). The pre-school program teaches young children about Jewish holidays and features a "Tot Shabbat" program every Friday. (A-21). Area rabbis have always visited and participated in the preschool, camp, and other LJCC programs. (A-19).

Prior to the fall of 2003, the LJCC invited older Jewish youth in the Lancaster area to meetings of the B'nai B'rith Youth Organization (BBYO)—a world-wide organization for Jewish teens aimed at developing leadership potential. (A-22). Respondent also offers religious educational programming directed at adults. *Id.* These programs are taught by local rabbis or other community members.

The LJCC is a contact point for the Jewish community of Lancaster. For example, it provides contact and general information to Jewish individuals new to the community regarding the area synagogues. (A-61). Jewish seniors may also meet at the LJCC's

"Friendship Club." *Id.* The LJCC also publishes the *Lancaster Jewish News*, which contains articles of general interest to the Jewish community, as well as articles espousing Jewish values and principles. (A-4).

Respondent also hosts special celebrations in connection with Jewish holidays, including Chanukah, Yom HaShoa, Sukkot, and Purim. (A-20). Local rabbis frequently attend and participate in these celebrations. (A-19).

Respondent maintains a kosher kitchen on its premises and serves strictly kosher food at all events hosted by the LJCC, including all holiday dinners. (A-21). For many years, the LJCC employed a Mashgiach (kosher supervisor) to ensure that the kitchen was run in accordance with Jewish dietary laws. *Id.* In or around November of 1999, the Mashgiach resigned. After the Mashgiach resigned, however, the LJCC worked with one of the rabbis in the community to ensure that functions at the LJCC would be kept kosher for those who observe the kosher mandate. *Id.*

The area rabbis have also provided feedback relied upon by the Board when evaluating the Executive Director's performance. For example, the Board Minutes from the February 3, 2003 meeting reflect that one of the Board's reasons for deciding not to renew Ms. Featherman's employment contract was her failure to ". . . have the confidence of the leaders of the synagogues." (A-18). These same minutes reflect the Board's concern that Featherman had alienated the Jewish organization Hadassah. *Id.*

Petitioner was hired in November of 1998 as a bookkeeper. (A-3). At her time of hire, Petitioner reported to Ted Busch, who then served as Executive Director. (A-60). In January of 2002, Natalie Featherman replaced Ted Busch as Interim Executive Director. (A-4). At the time that the LJCC hired Featherman, Respondent was in dire financial circumstances that had been worsening for some time. (A-4).

According to Petitioner, Featherman had generally poor relationships with the LJCC staff. (A-5). Petitioner testified that her relationship with Featherman began to deteriorate significantly in the spring of 2002 when Featherman distributed a memo to Petitioner and other members of the staff. (A-4). Petitioner frequently complained about Featherman and the decisions she made. For example, Petitioner complained about Featherman's decision to discharge Sandy Simms, a former employee of Lancaster's Office of Aging who performed some receptionist duties at the LJCC. (A- 5). Featherman terminated Simms on May 30, 2002 after Simms was absent and failed to call in to alert the LJCC of her absence. (A-5).

During 2002, the LJCC's finances continued to decline. (A-5). Circumstances became so critical that the Jewish Federation advanced to the LJCC fifty percent of the amount that had been allocated to it for 2003. (A-4). In an effort to keep the LJCC from closing its doors, Featherman considered various options for cutting costs and maximizing efficiency at the LJCC. After reviewing Petitioner's job position and responsibilities, Featherman concluded that

Petitioner's job duties could be more efficiently performed by one of Petitioner's co-workers. (A-5).

On August 30, 2002, Featherman notified Petitioner that her position had been eliminated due to the LJCC's financial crisis. (A-5). Petitioner does not dispute that the LJCC was in serious financial trouble at the time that her position was eliminated. Petitioner thereafter filed this action in the United States District Court for the Eastern District of Pennsylvania under Title VII, 42 U.S.C. § 2000e, claiming that she was terminated by the LJCC because of her religious beliefs and for allegedly opposing race discrimination.

Following discovery, the parties filed cross-motions for summary judgment. Respondent's motion sought the dismissal of all of Petitioner's claims. On December 16, 2004, Magistrate Judge Jacob Hart granted Respondent's motion and dismissed Petitioner's case. Judge Hart found that Respondent was exempt from Title VII's prohibition against religious discrimination due to its status as a religious corporation. Judge Hart also dismissed Petitioner's retaliation claim, finding that Petitioner could not establish a *prima facie* case of retaliation. Finally, Judge Hart dismissed the remaining state claim for lack of jurisdiction. (A-56-68).

Petitioner filed a motion for reconsideration of the court's summary judgment ruling on December 23, 2004. By order dated January 14, 2005, the court agreed to reconsider its ruling because one of the statements appearing in the court's December 16th opinion regarding the LJCC's funding was contrary to

the record. Following its reconsideration, the court issued a second order and accompanying memorandum dated February 17, 2005. (A-71). That order again found the LJCC to be a religious corporation and again granted summary judgment to the LJCC. The relief set forth in the February 17th Order is identical to that provided in the December 16th Order.

On February 25, 2005, Petitioner filed for a second time the same motion for reconsideration that she had filed on December 23rd. The only way in which this motion differed from the December 23rd motion is it had a different date and it referred to the February 17th Order, as opposed to the December 16th Order. The court denied for a second time this motion for reconsideration on March 11, 2005. (A-81).

On April 4, 2005 Petitioner filed an appeal of the district court's Order in the United States Court of Appeals for the Third Circuit. This case was argued before the Third Circuit Court of Appeals on September 26, 2006. On September 19, 2007 the Third Circuit Court of Appeals filed its opinion in this case. The Third Circuit Court of Appeal's decision affirmed the decision of the district court and held that the LJCC was entitled to the protection of Section 702 of Title VII because the LJCC's "structure and purpose were primarily religious." (A-15). The Third Circuit's opinion also affirmed the district court's grant of summary judgment on Petitioner's claims for retaliation because Petitioner had failed to "place[ ] enough evidence in the record to create a genuine issue of material fact as to whether there was a causal link between her complaints and her termination." (A-29).

Petitioner filed a petition for rehearing with the Court of Appeals which was denied by an order entered on October 26, 2007. (A-49).

REASONS FOR DENYING THE WRIT PETITION

This Court should deny the petition because there is no conflict between the Third Circuit's decision and any decision of this Court or any circuit court. Petitioner mischaracterizes this Court's precedent and the decisions of the lower courts in an attempt to create a conflict.

I. PETITIONER MISCHARACTERIZES THE HOLDING OF THIS COURT IN *AMOS* IN AN ATTEMPT TO CREATE A CONFLICT APPROPRIATE FOR THIS COURT TO REVIEW

Petitioner mischaracterizes this Court's holding in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). Petitioner asserts that in the *Amos* case this Court approved a test created by the district court in that case for the purpose of determining whether the exemption of Section 702 applied to a gymnasium run by the Mormon Church. (Petition at 14). Petitioner contends that "[t]he exemption was found applicable only because the gymnasium was 'intimately connected' to the Church financially and in matters of management." (Petition at 14) (citing *Amos*, 483 U.S. at 332).

Petitioner, however, overstates the holding of this Court in *Amos*. The question presented in *Amos* was, "whether applying the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment." *Amos*, 483 U.S. at 330. This court was not called on, however, to determine specifically whether the gymnasium was a religious organization itself. In fact, the plaintiffs in *Amos* did not contest that the defendants in that case were religious organizations. *See Amos*, 483 U.S. at 330 n.3; *Amos v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791, 798 (D.C. Utah 1984) ("The plaintiffs do not contest that the defendants or the Mormon Church are religious entities.").

The test to which Petitioner refers in the *Amos* case was a test devised by the United States District Court for the District of Utah to determine whether an activity conducted by a religious organization was religious or nonreligious. The import of this distinction was whether it was unconstitutional to extend the exemption of Section 702 to the nonreligious activities of a religious organization, not, as Petitioner suggests, a test for determining specifically whether an entity is a religious organization. This Court's decision in *Amos* therefore does not stand for the proposition for which Petitioner offers it and there is no conflict between the Third Circuit's opinion and this Court's precedent in *Amos* which would necessitate review of the Third Circuit's decision by this Court.

II. PETITIONER MISCHARACTERIZES THE NINTH CIRCUIT'S DECISION IN *TOWNLEY*

Petitioner devotes a substantial portion of her argument to the proposition that there is a split between the circuits concerning the interpretation of Section 702 that must be resolved by this Court. Petitioner's characterization of the Ninth Circuit's decision in *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610 (9th Cir. 1988), is particularly misleading because Petitioner insinuates that the court in *Townley* employed a different standard than the Third Circuit used in the present case.

In fact, the Ninth Circuit in *Townley* and the Third Circuit used precisely the same standard. This standard, as noted by the Third Circuit in this case, is: whether the organization's "structure and purpose [are] primarily religious." (A-25); *see also Townley*, 859 F.2d at 618-19. The Third Circuit also used the same factor test as the Ninth Circuit in making this determination.[3] This test requires that "[a]ll

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[3] As part of its analysis of the LJCC the Third Circuit listed a number of factors that it intended to consider. Although there is no exhaustive list of factors to be considered when determining an entity's character and purpose, the Third Circuit determined that over the years courts have looked at the following factors:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue,

significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." (A-16); *Townley*, 859 F.2d at 618.

It is noteworthy that the facts in *Townley* differ significantly from those in the present case. Townley Manufacturing Company was a mining equipment manufacturer whose owners were religious. The owners attempted to incorporate religion into the otherwise secular business of manufacturing mining equipment. In analyzing the application of Section 702, the court examined a number of factors to determine whether Townley Manufacturing Company was "primarily religious" in nature. *Id.* at 619. After examining a number of factors, including the nature of

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> (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

(A-16). (citing *Killinger v. Samford University*, 113 F.3d 196 (11th Cir.1997); *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir.1993); *Townley*, 859 F.2d at 618-19 (9th Cir.1988); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980)). Courts generally do not consider all of these factors in any one case and have found "religious corporation" status based on consideration of a relatively small number of these factors. *See EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992).

the operations of the company and whether its articles of incorporation stated any religious purpose, the court concluded that, "[w]hen viewed together, we have no difficulty in holding that these characteristics indicate that Townley is primarily secular." *Id.* at 619.

The Ninth Circuit's conclusion regarding the non-application of a religious organization exemption to a mining manufacturing equipment corporation is far from ground-breaking. Petitioner, however, suggests that this seemingly inconsequential case stands for the proposition that only "organizations funded or controlled by a religious group" may be considered religious organizations under Section 702. On the basis of this interpretation, Petitioner portrays her petition as a request for this Court to review a split in the circuits. In fact, the only analytical distinction between the Third Circuit's decision in the instant case and the *Townley* court is the interpretation of what is, at best, murky legislative history discussed in dicta in the *Townley* case.

Petitioner stakes her entire argument on two comments in the legislative history. These comments were part of a congressional debate leading up to the passage of the Civil Rights Act of 1964. During the course of this debate representatives were responding to questions about whether specific entities would fall under the exemption of Section 702. Petitioner identifies two comments by legislators on the subject of the scope of Section 702 during this debate. (Petition at 15-16). The first comment referred to by Petitioner is by Representative Roosevelt who confirmed for a fellow representative that an orphanage in the representative's district that was

wholly owned by a religious order would "unquestionably" be exempt under § 702. (Petition at 15-16) (citing *EEOC Legislative History of Titles VII and XII of the Civil Rights Act of 1964*, at 3201 (1968)). Representative Celler, then Chairman of the Judiciary Committee, likewise confirmed that the orphanage, as a wholly church supported organization, would fall under the exemption. (Petition at 16) (citing *EEOC Legislative History of Titles VII and XII of the Civil Rights Act of 1964*, at 3204).

These isolated comments do not lead to the conclusion, as Petitioner suggests, that Section 702 protects only formal houses of worship. As the Third Circuit majority opinion notes, this legislative debate "overwhelmingly regarded the ability of a secular educational institution teaching secular subjects, but affiliated with or owned by a religious order or organization, to hire preferentially persons of the same faith." (A-28) (citing *EEOC Legislative History of Titles VII and XII of the Civil Rights Act of 1964*, at 3199 (1968)). Therefore, this debate is irrelevant to the question examined by the Third Circuit in the present case. (*See* A-28). As the Third Circuit majority remarks, "It is a large leap from acknowledging this concern, whether or not well-founded, to concluding that the Congressmen believed the existing bill to protect virtually nothing beyond formal houses of worship." (A-28).

Petitioner's confidence in the clarity of the legislative history discussed in *Townley* is not justified. As the Third Circuit's opinion noted, the isolated comments relied on by Petitioner are "largely irrelevant" to the issues presented in this case. (A-

28).[4] The scope of the religious organization exemption was not clearly resolved by the legislators at the time of this debate and even the Ninth Circuit in *Townley* acknowledged that "'[this] debate is far from comprehensive.'" (A-27) (citing *Townley* 859 F.2d at 617). Further, it is noteworthy that the entirety of the Ninth Circuit's commentary on this point merely

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[4] Furthermore, reliance on isolated comments in legislative history is, in general, less than convincing. As this court has noted,

> legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in " 'looking over a crowd and picking out your friends.' " *See* Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L.Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

Exxon Mobil Corp v. Allapattah Services, Inc., 545 U.S. 546, 568-69 (2005).

bolstered its holding that a mining manufacturing equipment corporation was not a religious organization exempt from Title VII pursuant to section 702 – a decision reached through use of the same totality of the circumstances factor analysis employed by the Third Circuit in the case below. Respondent respectfully suggests that the Ninth Circuit's discussion of legislative history in the *Townley* case was no more than a digression and certainly cannot form the basis of any legitimate argument that a conflict exists among the circuits.[5]

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[5] Petitioner also misleadingly alleges that there are conflicts between the opinion of the Third Circuit in the present case and past decisions of other circuit courts. For example, Petitioner argues that the Third Circuit's opinion conflicts with the Fourth Circuit's opinion in *Fike v. United Methodist Children's Home, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). (*See* Petition at 12-13). In *Fike* the court considered whether a home for orphans that had been established by the Methodist church was a religious organization under Section 702. After examining the purpose and the day-to-day operations of the children's home, including whether or not the children were required to attend church services, the court concluded that "the United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization." *Fike*, 547 F. Supp. at 290. Petitioner erroneously concludes that because the ultimate determination of the Third Circuit's opinion differs from the ultimate conclusion of the court's decision in *Fike*, there is necessarily a conflict between the two courts. The Fourth Circuit Court of Appeals may have determined, after examining the unique facts of that case that the United Methodist Children's home had, over time, become a secular rather than a religious organization, whereas the Third Circuit may have concluded, after examining the unique fact of this case that the LJCC was a

III. THE STANDARD ERRONEOUSLY POSITED BY PETITIONER PRESENTS AN EXCESSIVE ENTANGLEMENT WITH RELIGION.

In light of this Court's precedent, *Townley* cannot stand for the proposition for which Petitioner offers it—i.e. that only "organizations funded or controlled by a religious group" may be considered religious organizations under Section 702. (Petitioner at 15). To attempt to define exactly what is and is not a religious organization under Section 702 would, as the court acknowledged in *Townley*, be outside the authority of the courts. *See Townley* 859 F.2d at 618.

Petitioner contends that the court below impermissibly examined the religious practices of the LJCC. (Petition at 19). Although Petitioner has accused the Third Circuit of delving too far into the religious beliefs of the LJCC, Petitioner's own argument urges this Court to accept an interpretation of the *Townley* case that would implement exactly such a test. Petitioner argues that the court's decision in *Townley* created an absolute rule that only churches and organizations funded or controlled by churches are covered by the exemption of Section 702. (Petition at 15). Such an interpretation of *Townley* would risk the creation of state entanglement with religion warned against by this Court. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *see also* A-25.

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religious organization but the two courts applied essentially the same factors to those different facts when making their decisions.

Section 702 of the Civil Rights Act of 1964 provides in relevant part that "[t]his title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). Respondent suggests that Section 702 does not offer a definition of a religious corporation, association, educational institution, or society because to subdivide this definition to any greater degree would create an impermissible entanglement with religion. If Congress would have imposed the church-based approach espoused by Petitioner, Section 702 would cause or at least implicate a state entanglement with religion. As this Court stated in *Amos*, "It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." *Amos*, 483 U.S. at 340. Justice Brennan reinforced this idea in his concurrence in *Amos*, noting that attempting to determine whether a particular activity of a religious organization is religious or secular "results in considerable ongoing government entanglement in religious affairs." (A-25) (citing *Amos* 483 U.S. at 343 (Brennan, J., concurring)). For this reason, the only analysis the courts may properly conduct is the totality of the circumstances-based factor analysis to determine whether the character and purpose of an organization is religious or secular.

With the full awareness of these concerns, the Third Circuit majority's opinion specifically declined Petitioner's "invitation to hold that the LJCC is a center for Jewish culture rather than religion . . . because to engage in such an analysis would risk precisely the sort of state entanglement with religion that the Supreme Court has repeatedly warned against." (A-25) (citing *Amos*, 483 U.S. at 343 (Brennan, J., concurring; *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)). Had the court below taken up Petitioner's offer to attempt to form a legal conclusion as to whether Jewish culture and religion are separate, it would have improperly entangled itself in questions of theology. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (stating that inquiry into the religious nature of an organization should be avoided because "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious").

The Third Circuit majority's opinion instead analyzed the LJCC's stated religious mission which is to "develop, involve, and sustain a cohesive Jewish community through identity, education, and cooperation through all ages," and then discussed the specific ways in which the LJCC carries out this mission in the community. The court below did not attempt to determine which of the religious aspects of the LJCC are more significant than the others, nor did it attempt to delve into the centrality of particular beliefs or interpretations of those beliefs. After reviewing all of these factors the Third Circuit determined that "[t]hese characteristics of the LJCC,

taken together, clearly point to the conclusion that the LJCC was primarily a religious organization." (A-22). The Third Circuit Court of Appeals correctly concluded that Respondent was a religious organization entitled to the protection of Section 702 of Title VII because its structure and purpose were primarily religious.

CONCLUSION

For the foregoing reasons Respondent asks that this Court deny the petition for a writ of certiorari.

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Respectfully submitted,

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